C-961/1

HINDU LAW

by

B.M. Gandhi

B.A., L.L.B. (Bom), L.L.M. (Guj)
Former Principal, Law College, Modasa
Author: 'Law of Torts' 'Equity, Trust and Specific Relief'
Revising author: 'Landmarks in Indian Legal and Constitutional History'

EASTERN BOOK COMPANY
LUCKNOW

CONTENTS

		Pages
TABLE OF CASES	..	XXX
Chapters		
I. Introduction and Origin	..	**1**
A. General	..	1
B. Dharma: Meaning, Sources, Nature & Purpose	..	3
C. Caste system: its History and role	..	8
D. Hindu and Hindu religion	..	9
E. Hinduism	..	14
F. Jainism and Hindu Religion: Difference between	..	15
G. Characteristics of Hinduism	..	16
H. Origin	..	17
I. Hindu law: How far applicable	..	19
II. Sources and Operation	..	**21**
A. General	..	21
1. Shrutis or Vedas	..	22
2. Smritis or Dharmashastras	..	23
3. Comparison with Muslim law	..	26
4. Commentaries and Digests	..	27
5. Judicial Decisions	..	30
Duty of Courts	..	30
6. Legislation	..	31
Enactments modifying, abrogating and supplementing the Hindu law	..	31
7. Custom or usage (Sadachar)	..	33
8. Equity, Justice and Good Conscience	..	38
9. Text-Books	..	38
B. Schools of Hindu law	..	39
Authority of the works	..	41
C. Differences between the *Mitakshara* and the *Dayabhaga* Schools	..	42
D. Effect of legislation	..	43
E. Persons governed by Hindu law	..	44
F. Migration and its effect	..	45

Pages

II. Sources and Operation (*contd.*)

G. Codification 45

H. The Doctrine of *Factum Valet* 46

III. Joint Family **48**

A. Mitakshara law 49

1. Nature 49
2. Composition 51
3. Essential features 52
4. Hindu coparcenary 52
5. Notable features of a Hindu coparcenary .. 56
6. Joint tenancy of English law and Hindu coparcenary: Difference 58
7. Coparcenary property 59

Property included in joint family property .. 59

8. Presumptions as regard coparcenary and coparcenary property 61
9. Distinction between obstructed (सप्रतिबंधदाय) and unobstructed (अप्रतिबंधदाय) heritage 64
10. Property: Classification of 64
11. Joint family property: Divisions 65
12. Incidents of joint property and separate property 67
13. Ancestral property 69
14. Separate property 72
15. Ancestral business 76
16. Difference between an ordinary partnership and a Hindu joint family firm 76
17. Rights of Coparceners 80
18. Right of survivorship: When lost 83

Disabilities of Coparceners 84

19. Manager (Karta) 85
20. Manager's liability 95
21. Alienation of coparcenary property 97
22. Alienation of undivided coparcenary interest .. 101
23. Rights and remedies of purchaser of undivided coparcenary interest 102
24. Insolvency of coparcener: Effect of 104
25. Who may object to alienations 105

Pages

III. Joint Family (*contd.*)

B. Dayabhaga Law 108

26. Dayabhaga joint family 108

IV. Debts **111**

A. Grounds of Liability 111

B. Debts under Mitakshara Law 112

1. Heir's liability 112

2. Liability for coparcener's debts 113

3. Liability of a son including grandsons and great-grandsons to pay the father's debts 113

4. Doctrine of pious obligation of a Hindu son to pay his father's debts—Meaning, origin and nature of liability 114

5. Father's right to alienate coparcenary property: Nature of 120

6. What is an antecedent debt? 121

7. Time-barred debts 122

8. What is an illegal or immoral debt? 122

9. Suretyship of father: Son's liability 125

10. Enforcement of liability after partition 125

C. Debts under the Dayabhaga law 127

D. Abolition of Pious Obligation 128

V. Partition and Reunion **130**

A. Partition 131

1. What is partition 131

2. Family arrangement 133

3. Partition and family arrangement: Difference .. 135

4. Agreement not to partition how far valid. . .. 135

5. Property liable to partition 136

Exceptions 136

6. Provisions to be made on partition 137

7. How partition is effected 138

8. What does not bring about partition? 143

9. Persons entitled to sue for partition 144

10. Persons who cannot sue for partition 144

11. Parties necessary to a partition suit 145

12. Special power of a Hindu father to effect partition 145

Pages

V. Partition and Reunion (*contd.*)

13. Son's right to sue his father for partition. . .. 147
14. Births and deaths in family: Effect on partition .. 147
15. Sons born subsequently 148
16. Persons entitled to a share 148
17. Allotment of shares 153
18. Partial partition 157
19. Reopening partition 160
20. The effect of partition 163

B. Reunion 164

21. Reunion 164
22. Exclusion from partition 165
23. Partition under *Dayabhaga* law 165
24. Difference from *Mitakshara* system 165

VI. Impartible Estates **169**

A. Meaning 169

1. Differs from joint family property 169
2. Instances 169

B. How such estates originated. 170

C. Incidents of Impartible Estates 170

1. Held by one person 170
2. Rule of Primogeniture 171
3. Whether coparcenary or joint family property .. 171
4. Income and its accumulation 171
5. Right of alienation 171
6. Maintenance 172
7. Debts 172
8. Accretions 172

D. Succession to Impartible Estates 172

Abolition and Re-grant of erstwhile Watan or Inami lands: Rule of Primogeniture 174

VII. The Rule of Damdupat **175**

A. Meaning 175
B. Explanation 175
C. Object 175
D. Application of the rule 176
E. Who can benefit from the rule 176
F. Where the rule does not apply: (Exceptions to the rule) 177

		Pages
VIII.	**Benami Transactions**	**178**
	A. Meaning	178
	B. Definition	178
	C. Causes of Origin	179
	D. Characteristics	179
	E. (1) Position up to 18-5-1988	180
	(*a*) Title of the true owner: When recognised ..	180
	(*b*) Onus of proof	180
	(*c*) When the real title is not given effect to ..	181
	(*d*) Benamidar's right to sue	181
	(*e*) Decree against benamidar	181
	(2) Position from 19-5-1988	182
	(*a*) Benami Transactions (Prohibition) Act, 1988	182
	(*b*) Its effect	182
IX.	**Gifts and Wills**	**183**
	A. Gifts	183
	1. Definition	183
	2. Subject-matter of gift	184
	3. When is a gift complete	184
	4. Capacity to make a gift	185
	5. Capacity of the donee to acquire.	186
	6. Gift to unborn persons	186
	7. Deposit in the name of wife or child	187
	8. Gift with conditions restraining alienation ..	187
	9. Gift in fraud of creditors	187
	10. Donation mortis causa	187
	11. Gift reserving usufruct of property gifted ..	187
	12. Trusts	187
	13. Revocation of gift	188
	14. Proof	188
	15. Distinction between gifts and wills	189
	B. Wills	189
	1. Definition	189
	2. Testamentary power to make a will	189
	3. Capacity to make a will	190
	4. Capacity to take under a will	190
	5. What may be bequeathed	190
	6. Probate and letters of administration	192

Pages

IX. Gifts and Wills (*contd.*)

7. Bequest to unborn persons 192
8. Will in favour of female 192
9. Estates unknown to Hindu law 192
10. Power of appointment 193
11. Direction for accumulation 193
12. Construction of wills 193

X. Religious and Charitable Endowments 196

A. What is an endowment 196
B. What is debutter property 196
C. Public and private endowments: Distinction .. 197
D. Devasthanam and Math 198
Distinctions 199
E. Requisites of a valid endowment 199
F. Endowments: Noteworthy points 200
G. Religious and charitable uses 200
(1) Creation of endowments 201
(2) Essentials of a valid endowment 202
(3) Illusory endowments 203
(4) Dedication 203
(5) Categories of endowments 204
(6) Burden of proof 206
H. Shebait: His position, powers and duties 206
(1) Right to offerings 207
(2) Delegation of authority 207
(3) Devolution of office of a shebait 207
I. Mahant: His position, rights and liabilities 208
(1) Presumption as to property in possession of a Mahant 209
(2) Devolution of Mahant's office 210
J. Removal of Shebaits and Mahants 210
K. Alienation of Debutter Property 211
Burden of proof 212
L. Rights of the founder 212
M. Doctrine of cy pres: when applicable 213
N. Limitation 213

Pages

XI. Stridhana 215
A. Meaning 215
B. Classification 215
C. Smriti writers and commentators on Stridhana .. 215
D. Test of Stridhana 216
E. Stridhana includes 216
F. Definition by Yajnavalkya 217
Expansion by Vijnaneshwar 217
G. Privy Council and Mitakshara on Stridhana 217
H. Salient features of Stridhana 218
I. Sources of Stridhana 218
J. Rights of a woman over Stridhana 220
Jurisdiction to try the case 220
K. Succession to Stridhana 220
1. Distinctive features 220
2. Unmarried woman 221
3. Married woman: Mitakshara 221
4. Dancing girls: Sūccession to their property .. 223

XII. Woman's Estate 224
Two categories 224
A. Position before the passing of the Hindu Succession Act, 1956 224
1. Nature of woman's estate 224
2. Incidents of a woman's estate 225
B. Change brought about by the Hindu Succession Act, 1956 227

XIII. Inheritance under the Mitakshara and Dayabhaga Schools before 1956 229
A. General 229
B. Property passing by succession 230
C. Foundation of the rules of inheritance 230
D. General principles of succession 231
1. Agreement cannot override it 231
2. No transfer: It being spes successionis 231
3. Inheritance cannot remain in suspense 231
4. Absolute estate and limited estate 232
5. Fresh stock of descent 232

Pages

XIII. Inheritance under the Mitakshara and Dayabhaga Schools before 1956 (*contd.*)

6. Whole-blood preferred to half-blood 232
7. Blood relation and religious efficacy 232
8. The Doctrine of Representation 233
9. Tenants-in-common and joint tenants 234
10. Division per stirpes and per capita 234

XIV. Exclusion from Inheritance and Partition 236

A. General 236
B. Law prior to 1956 236
1. Unchastity 236
2. Remarriage 237
3. Illegitimacy 237
4. Natural, physical or mental defects 238
5. Murder 238
6. Change of religion and loss of caste 239
7. Adoption of a religious order 240
8. Custom 240
C. Effect of disqualification 240
D. Exclusion from partition 240
E. Law from 1956 240

XV. Law as to Illegitimate Children 241

A. Maintenance 241
B. Joint Family property and partition 242
C. Guardianship 242
D. Inheritance 243

XVI. Marriage 244

[A]

1. Law antecedent to the Hindu Marriage Act, 1955 .. 246
(*a*) The concept 246
(*b*) Its forms 247
(*c*) Ceremonies 248
(*d*) Incursions made by culture, customs and statutes 248
(*e*) Summary 249
2. Legislation prior to 1955 249
3. Changes effected by the Hindu Marriage Act, 1955 .. 251

XVI. Marriage (*contd.*) *Pages*

4. Overriding effect of the Act : Section 4 252
General observation on the four Acts 254
5. Text: Sections 1, 2 and 3 255
6. Application of the Act: Section 2 257
7. Definitions: Section 3 261
(*a*) Custom and usage: Section 3(*a*) 261
(*b*) District Court: Section 3(*b*) 261
(*c*) Full-blood and Half-blood: Section 3(*c*) .. 262
(*d*) Uterine Blood: Section 3(*d*) 262
(*e*) Prescribed: Section 3(*e*) 262
(*f*) Sapinda relationship and Sapinda: Section 3(*f*)(*i*) & (*ii*) 262
(*g*) Rules of Sapinda relationship 263
8. Degrees of prohibited relationship: Section 3(*g*) .. 264
Table of PDM 264

[B]

HINDU MARRIAGES

9. Text: Sections 5 to 8 265
10. Conditions for a Hindu marriage: Section 5 266
(*a*) Parties to be Hindus 266
(*b*) Monogamy 267
(*c*) Absence of idiocy, lunacy and unsoundness of mind 268
(*d*) Age of parties 269
(*e*) Parties not to be within the ''degrees of prohibited relationship'' 270
(*f*) Parties not to be Sapindas of each other.. .. 271
(*g*) Additional conditions 271
11. Ceremonies for a Hindu marriage: Section 7 .. 272
Innovation of new ceremonies 272
Presumption of Legitimacy of child 273
12. Registration of Hindu marriages: Section 8 273

[C]

RESTITUTION OF CONJUGAL RIGHTS AND JUDICIAL SEPARATION: SECTIONS 9 & 10

13. Text: Section 9-10 276
14. Restitution of conjugal rights: General: Section 9 .. 277
(*a*) Society, conjugal society and matrimonial home.. 278

Pages

XVI. Marriage (*contd.*)

(*b*) Withdrawal 279
(*c*) Constitutionality of Section 9 280
15. Judicial separation: Section 10 281
(*a*) General 281
(*b*) Grounds for Judicial Separation 282
(*c*) Effect and rescission of decree 282

[D]

NULLITY OF MARRIAGE AND DIVORCE

16. Text: Sections 11, 12, 16, 17, 18 283
17. Void marriages: Section 11 285
(*a*) General 285
(*b*) Marriages that are void 285
(*c*) Declaration of nullity 286
(*d*) Interpretation of the section and application of Heydon's rule 286
(*e*) Double bigamy and nullity decree 288
(*f*) Declaration of nullity 288
18. Voidable marriages: Section 12 289
(*a*) General 289
(*b*) Void and voidable marriage: Difference: Sections 11 & 12 289
19. Grounds for remedy of annulment of marriage under Section 12 289
(*a*) First ground: Impotency: Section 12(1)(*a*) .. 290
(*b*) Second ground: Unsoundness of mind, mental disorder and recurrent attacks of insanity and epilepsy: Section 12(1)(*b*) 292
(*c*) Third ground: Consent obtained by force or fraud: Section 12(1)(*c*) 293
(*d*) Fourth ground: Pregnancy of the bride: Section 12(1)(*d*) 293

[E]

DIVORCE

20. Text: Sections 13 to 15 294
(*a*) General 297
(*b*) Analysis of the section: S. 13 298
(*c*) Summary of the grounds 298

XVI. Marriage (*contd.*) *Pages*

(*d*) Adultery
Cases 299
(*e*) Cruelty 300
(*f*) Desertion 304
Cause for desertion, on merits, held to be reasonable 322
(*g*) Conversion 324
(*h*) Insanity or mental disorder 327
(*i*) Leprosy 328
(*j*) Venereal disease 329
(*k*) Renouncing the world 329
(*l*) Unheard of for seven years or more 330
(*m*) Judicial separation decreed 330
(*n*) Non-restitution of conjugal rights 331
(*o*) Bigamy 331
(*p*) Rape, sodomy and bestiality 331
(*q*) Maintenance decreed to wife 332
(*r*) Repudiation of marriage by wife 333
(*s*) Divorce and Judicial Separation: Distinction .. 333
(*t*) Alternative relief in divorce proceedings: S. 13-A 334
(*u*) Divorce by mutual consent: S.13-B 335
(*v*) Divorce petition: When presented: S. 14 .. 335
(*w*) When divorced persons may remarry: S. 15 .. 341

[F]

JURISDICTION AND PROCEDURE

21. Text: Ss. 19 to 28-A 342
22. Jurisdiction of courts, petition and application of Civil Procedure Code, 1908: Ss. 19, 20 & 21 342
23. Power to transfer petitions (S. 21-A) and trial, disposal (S. 21-B), evidence (S. 21-C) and proceedings (S. 22) 346
24. Decree and relief: Ss. 23 & 23-A 347
25. Desirable guiding principles 349
26. Alimony (Maintenance) pendente lite: S. 24 .. 351
27. Permanent alimony or permanent maintenance: S. 25 352
(*a*) What amount is payable 354
(*b*) Considerations before such an order 355
(*c*) When such an order is varied, modified and rescinded 355

Pages

XVI. Marriage (*contd.*)

28. Custody of children: S. 26 356
    (*a*) Court's power 356
    (*b*) Children 356
    (*c*) Welfare of the minor, a guiding principle .. 357
    (*d*) Custody 357
    (*e*) Maintenance 358
    (*f*) Children's wishes 358
29. Disposal of property: S. 27 358
30. Appeals, orders and their enforcement: Ss. 28 & 28-A 359

[G]

SAVINGS AND REPEALS

31. Text: Ss. 29, 30 359
32. Legitimacy of children: Section 16 361
33. Offences relating to marriage 362
    (1) Deceitfully obtaining the body of a woman: S. 493 362
    (2) Inducing a wrong belief of a valid marriage: S. 496 363
    (3) Bigamy: S. 494 363
    (4) Adultery: S. 497 363
    (5) Criminal elopement: S. 498 364
    (6) Feigning conversions to escape punishment for bigamous marriages 364
    (7) Rajasthan Dharma Swatantrya Bill, 2006 .. 365

XVII. Succession **366**

[A]

1. Introductory 367
2. Hindu Succession Act, 1956: Notable features and the changes effected 368
3. Brief history, object and scope of the Act 371
4. Title, extent and commencement (Section 1). . .. 372
5. Text: Sections 2, 3 & 4 372
    (*a*) Application (Section 2) 374
    (*b*) Definitions (Section 3) 374
    (*c*) Overriding effect of the Act: (Section 4) .. 375

[B]

INTESTATE SUCCESSION

6. Text: Sections 5, 6, 7 & 17 375

XVII. Succession (*contd.*) *Pages*

7. Act not to apply to certain properties (Section 5) .. 378
8. Devolution of interest in coparcenary property (Section 6) 379
   (*a*) Scope and applicability 379
   (*b*) Para one 380
   (*c*) Para two 380
   (*d*) Explanations 380
   (*e*) Illustrations 382
9. Devolution of interest in the property of a Tarwad, Tavazhi, Kutumb Kavaru or Illom (Section 7) .. 382
   (*a*) General 382
   (*b*) The Marumakkattayam and the Aliyasantana law 383
   (*c*) Sthanam property 384
   (*d*) Special provisions in regard to persons governed by Marumakkattayam and Aliyasantana laws (Section 17) 384

[C]

GENERAL RULES OF SUCCESSION IN THE CASE OF MALES (SECTIONS 8-13 & 19)

10. Text: Sections 8-13 & 19 386
11. General 387
12. When does Section 8 apply? 387
13. Classification of heirs 388
   (*a*) Class I heirs 388
   (*b*) Class II heirs 389
   (*c*) Notable points 390
   (*d*) Class III and Class IV heirs 392
14. Order of succession among heirs in the Schedule (Section 9) 392
15. Distribution of property among heirs in Class I (Section 10) 393
   (*a*) Rules 393
   (*b*) Illustrations 394
16. Distribution of property among heirs in Class II (Section 11) 395
17. Distribution of property among agnates and cognates (Sections 12 and 13) 395

Pages

XVII. Succession (*contd.*)

Illustrations 396

18. Computation of degrees (Section 13) 396

(*a*) Rules 396

(*b*) Table 397

[D]

PROPERTY OF A FEMALE HINDU AND RULES OF SUCCESSION IN HER CASE (SECTIONS 14, 15 & 16)

19. Text: Sections 14, 15 & 16 397

20. Absolute property of a female Hindu (Section 14) .. 398

(*a*) Scope and application 398

(*b*) Section 14(1) 400

(*c*) "Property", "Acquisition" and "Possession" Meaning of 400

(*d*) Section 14(2) 404

21. General rules of succession in the case of a female Hindu: (Sections 15 & 16) 405

(*a*) Scope and application (Section 15) 405

(*b*) Groups of heirs [Section 15(1)] 406

(*c*) Kinds of property of the deceased intestate female [Section 15(2)] 406

(*d*) ''Son'', ''stepson'', ''sons & daughters'' .. 407

(*e*) Stepsons and stepdaughters 407

(*f*) Exceptions to Section 15(1) 408

22. Order of succession and manner of distribution among heirs of a female Hindu (Section 16) 408

(*a*) Three rules 408

(*b*) Scope and application 409

(*c*) Illustrations 410

[E]

AMENDMENTS

[F]

GENERAL PROVISIONS RELATING TO SUCCESSION (SECTIONS 18-24)

23. Text: Sections 18-23 411

24. General 412

(*a*) Full-blood preferred to half-blood (Section 18) .. 412

Pages

XVII. Succession (*contd.*)

(*b*) Mode of succession of two or more heirs (Section 19) 412
(*c*) Right of children in womb (Section 20) 413
(*d*) Presumption in cases of simultaneous deaths (Section 21) 414
(*e*) Preferential right to acquire property (Section 22) 415
(*f*) Special provision respecting dwelling-houses (Section 23) 416
Scope and application 416

[G]

DISQUALIFICATION AND ESCHEAT

25. Text: Sections 24-28 & 29 418
26. General 418
Exception (Section 28) 418
(*a*) Widows remarrying (Section 24) 419
(*b*) Murderer disqualified (Section 25) 419
(*c*) Convert's descendants disqualified (Section 26) .. 420
27. Status of the disqualified person (Section 27) .. 421
28. Disease, defect, etc. not to disqualify (Section 28) .. 422
(*a*) Meaning of disease, defect, and deformity .. 422
(*b*) Unchastity no disqualification 422

[H]

ESCHEAT

29. Failure of heirs (Section 29) 423
(*a*) The section 423
(*b*) Escheat: Meaning of 423
(*c*) Scope & application 423

[I]

TESTAMENTARY SUCCESSION

30. Text: Section 30 424

[J]

REPEALS

Power to make a will 424
31. Repeal 425
The Schedule 425

	Pages
XVIII. Adoption	**427**
A. Adoption: Meaning, object and forms	427
General	427
B. Hindu Adoptions and Maintenance Act, 1956 ..	429
C. Definitions: Section 3	429
Custom and usage: [Section 3(*a*)]	430
Maintenance: [Section 3(*b*)]	430
D. Overriding effect of the Act: (Section 4)	430
Act not retrospective	431
E. Changes effected by the HAM Act, 1956	431
(1) Overriding effect of the Act (Section 4) ..	431
(2) Capacity to take in adoption	431
(3) As to persons capable of giving in adoption ..	432
(4) Regarding persons who may be adopted ..	432
(5) Regarding conditions as to a valid adoption ..	433
(6) Regarding results or effects of adoption ..	433
(7) Maintenance	434
F. Objects of adoption	434
G. Text: Sections 5 to 11: (Requisites of adoption) ..	435
H. Regulation of adoptions (Section 5)	437
I. Characteristics of a valid adoption (Sections 6 & 11)	437
J. Capacity and the right to take in adoption (Sections 7 and 8)	440
Gender Bias in Adoption Law	440
K. Capacity of a female Hindu to take in adoption (Section 8)	443
L. Persons capable of giving a child in adoption (Section 9)	443
Mother's consent when not necessary	444
Capacity of the mother	444
Capacity of the guardian: Conditions	444
Duty of court	444
Inter-country adoption	445
Abandoned child: adoption of	445
Some Questions unanswered	446
M. Who is eligible for adoption (Sections 10 & 11) ..	447
N. Effects of adoption (Section 12)	448

Pages

XVIII. Adoption (*contd.*)

O. Doctrine of relation back 450
Exceptions to the doctrine 452
P. Proof of adoption 452
Q. Peculiar kinds of adoptions 452
R. Text: Sections 13 & 14 455
S. Text: Sections 15 to 17 and Sections 29 & 30 .. 456
Presumption in favour of ancient adoptions (Section 16) 457

XIX. Maintenance **459**

[A]

1. Text: (Ss. 18 to 28) 459
2. Maintenance: Meaning and sources 462
3. Law prior to Hindu Adoptions and Maintenance Act, 1956 463
4. The Hindu Adoptions and Maintenance Act, 1956 .. 463
5. Changes brought about by the Act of 1956 464
6. Applicability of the Hindu Adoptions and Maintenance Act, 1956 465
7. Definitions (Ss. 3 & 21) 465
   Dependants (S. 21) 465
8. Kinds of liabilities for maintenance 466
9. Maintenance of wife (S. 18) 466
   Summary 468
10. Maintenance of widowed daughter-in-law (S. 19) .. 469
11. Maintenance of children and aged parents (S. 20) .. 471
12. Maintenance of dependants (Ss. 21 & 22) 472
    List of dependants (S. 22) 472
13. Amount of maintenance (S. 23) 474
    (*a*) Award of maintenance to wife, children or infirm parents S. 23(2) 475
    (*b*) Award of maintenance to a dependant [S. 23(3)] 475
    (*c*) The claimant should be a Hindu (S. 24) 477
    (*d*) Alteration in the amount of maintenance (S. 25) .. 479
    (*e*) Debts to have priority (S. 26) 480
    (*f*) Maintenance when to be a charge (S. 27) .. 480

Pages

XIX. Maintenance (*contd.*)

(*g*) Effect of transfer of property on right to maintenance (S. 28) 481
(*h*) Right of maintenance not transferable 481

[B]

GENERAL LAWS

1. The Family Courts Act, 1984 481
(*a*) General 481
(*b*) Concept, purpose and status 482
(*c*) Constitution 483
(*d*) Jurisdiction (S.7) 483
(*e*) Procedure (Ss. 9 to 14) 484
(*f*) Undesirability of lawyers' interference 484
(*g*) Bombay H.C's. view 484
(*h*) Components of auxiliary service 485
(*i*) Evidence and decree 486
(*j*) Miscellaneous 486

OTHER LAWS

2. Maintenance proceedings under the CrPC: Ss. 125-128 486
(*a*) Who can claim maintenance under Section 125 487
(*b*) From whom maintenance can be claimed .. 489
(*c*) Conditions for granting maintenance 489
(*d*) Who has jurisdiction 489
(*e*) Procedure 490
(*f*) Order 490
3. The Special Marriage Act, 1954 & Divorce Act, 1869 491

XX. Minority and Guardianship 492

A. General 492
B. Application of the Act (S. 3) 493
C. Definitions (S. 4) 494
D. Guardian 494
E. Overriding effect of the Act (S. 5) 494
F. Main changes brought about by the Hindu Minority and Guardianship Act, 1956 495
G. Natural guardian (Ss. 6, 7) 495
H. Powers of a natural guardian (S. 8) 499

Pages

XX. Minority and Guardianship (*contd.*)

I. Testamentary guardians and their powers (S. 9) .. 502
Powers 503
J. Minor's incompetency to act as a guardian of property (S. 10) 504
K. De facto guardians (S. 11) 504
L. Guardian appointed by a court 505
M. Guardianship regarding minor's undivided interest in joint family property (S. 12) 505
N. Minor's welfare to be the paramount consideration (S. 13) 506
Explanation 506
Concept of ''welfare of the child'' and custody .. 506
O. Duties, rights, powers and liabilities of a guardian appointed by court 509

XXI. A Postscript **510**
Modern Hindu Law and the Constitution .. 510
1. General 510
2. The postulates 510
3. At present 511
4. Issues 511
5. Opinions 511
6. Questions unanswered 512
7. Religion-based discrimination under modern Hindu law 513
8. Religion-based discrimination under the secular laws on marriage and succession 516
9. Sex-based discrimination 517
10. Where all this leads to 518
11. Possible solution 519

APPENDIX **522**

SUBJECT INDEX **526**

Chapter I

Introduction and Origin

SYNOPSIS

A. General
- Ancient system of law
- Not the result of legislation
- A branch of *Dharma*
- The oldest pedigree of jurisprudence
- Survival against odds
- After independence
- Two broad divisions

B. Dharma: Meaning, Sources, Nature & Purpose
- Meaning
- Foundation of all affairs
- Collective wisdom of people
- Sources
- Commands
- Classification
- Varnashram
- Fragmentation into castes

C. Caste system: Its History and role
- Advent of Britishers and modern renaissance
- Landmark years in History of Hindu law

D. Hindu and Hindu Religion
- Originally—people living beyond Indus
- Meaning of "Hindu"
- Four castes
- Not dependent upon birth, but on actions
- Converts
- Arya Samajists
- Effect of conversion

E. Hinduism
- What is
- It is a trio of principles
- Four Codifying Acts

F. Jainism and Hindu Religion: Difference between

G. Characteristics of Hinduism
- Tolerance and adaptation, and accommodation
- Joint Family
- Medhatithi's view
- Kanad's view

H. Origin

I. Hindu Law: How far applicable

A. GENERAL

Ancient system of law

The Indian soil as observed by Dr Julius Jolly has not only been productive in deep thinkers, eminent founders of world religions and gifted poets, but it has also brought forth a system of law, which after having spread over the whole vast continent of India, had penetrated at an early period into Myanmar (then Burma) and Thailand (then Siam), and has become the foundation of the written law in these two countries.

Being the most ancient legal system of jurisprudence it generally goes far back to a period more than six thousand years — a period before 4000 B.C. — when the Rgveda is believed to have had its beginning.[1]

Not the result of legislation

One should, however, remember that Hindu law originally was not the result of legislation; it has divine origin. It is not "law" as is understood by the

---

1. P.V. Kane: *History of Dharmshastra*, Vol. II, Pt. 1, p. 11.

world in modern times. It is not pure customary law like the Common Law of England. As observed by the Chennai High Court,[2] Hindu law consists of a body of rules contained in several Sanskrit books regarded as authoritative, through the ages. That successive rulers recognised and continued these rules unaltered, is evident proof of its authority which it acquired in their enforcement.[3] The British rulers in India and Indian legislation affirmed its applicability to Hindus so far as they were not in conflict with the statute law.[4]

A branch of *Dharma*

As understood, law is a branch of *Dharma*. In consequence the Hindu law covers the civil, religious and moral systems of law, which in modern times are separate. Hindu law was never static, but it was progressive. Allegations were made by an English author that Hindu law was "a mere phantom of the brain, imagined by Sanskritists without law, and lawyers without Sanskrit" but Dr Sen has rightly met this caprice when he says that the critic who saw nothing in Hindu law but a stagnant mass of archaic rules, knew not what he said, and only showed that he himself had a stagnant mind.[5]

Walker[6] describes Hindu law as a specimen of the class of religious laws followed not by the citizens of a particular State, but by the adherents of a particular religion.

The oldest pedigree of jurisprudence

"Hindu law" says Mayne, "has the oldest pedigree of any known system of jurisprudence and even now it shows no signs of decrepitude." The system as modified through centuries has been in existence for over five thousand years and has continued to govern the social and moral patterns of Hindu life with amazing catholicity of vision, harmonizing the diverse elements of Hindu cultural life".

Survival against odds

Despite Muslim and later British supremacy in India, Hindu law survived, first as a religion and custom and later as law applicable, particularly to personal and family relations, though even in this respect this represented a restriction on the ambit of Hindu law; in that law on Western lines came to apply to other relationships.

British judges in India were hampered by the inability to discover the principles of Hindu law and for long invoked the aid of pandits, religious teachers, to interpret the relevant rules. Latterly popular customs were collected

---

2. *Vaniakone* (*Mokkakone*) v. *Vannichi Ammal*, AIR 1928 Mad 299 (FB): ILR (1927) 51 Mad 1.
3. J.D. Mayne: *Hindu Law & Usage*, 10th Edn., pp. 1-5.
4. *Vidya Varuthi* v. *Baluswami*, AIR 1922 PC 123: (1921) 41 MLJ 346.
5. N. Sengupta: *Evolution of Ancient Indian Law*, (1962).
6. D.M. Walker: *Oxford Companion to Law*, 1980 Edn., p. 571.

and applied, but English judges and jurists, in their ignorance, frequently seriously distorted Hindu law, and sometimes imported ideas from English law with similar effect. The effect of British rule was, generally, to limit the sphere of Hindu law to the family organization, land tenure and succession. The resulting amalgam of Anglo-Hindu law was expounded in various treatises, as by J.D. Mayne and D.F. Mulla.[7]

After independence

Since India's independence in 1947 the caste system has been rejected and parts of a Hindu code enacted,[8] which in many respects had made fundamental changes and the tendency in India is to replace law related to religion by secular law on Western lines so as to achieve a just social order and prohibit discrimination on grounds of caste or sex.

Two broad divisions

The Hindu law, broadly therefore, falls into two broad divisions, uncodified Hindu law and codified Hindu law. Present legislation has to a substantial extent curtailed the application of uncodified Hindu law. For example if a Hindu commits a murder he will be tried by the Indian Penal Code and the Criminal Procedure Code, and not by the ancient Hindu Law Jurisprudence.

The definition of Hindu law given by Mayne in his treatise does not hold good today because this law, to a large extent, has now been codified and the law is found in the following four Acts:

(1) The Hindu Marriage Act, 1955,

(2) The Hindu Minority and Guardianship Act, 1956,

(3) The Hindu Adoptions and Maintenance Act, 1956, and

(4) The Hindu Succession Act, 1956.

In spite of this the law relating to (*i*) Hindu joint families, (*ii*) their partition and reunion, as well as the law relating to (*iii*) wills, (*iv*) gifts and religious usages and institutions (in so far as it is not abrogated or modified by any other Act) continues to be derived from the ancient sources of Hindu law.

B. DHARMA: MEANING, SOURCES, NATURE AND PURPOSE

Meaning

The word *Dharma* is a Sanskrit expression. It comes from the root "Dhru"

---

7. D.M. Walker: *Oxford Companion to Law*, 1980 Edn., at pp. 571, 572; S.S. Iyengar: J.D. Mayne's *Hindu Law & Usage*, 10th Edn. (1938); D.F. Mulla: *Principles of Hindu Law*, 10th Edn. (1946).
8. The Hindu Marriage Act (25 of 1955); The Hindu Minority and Guardianship Act (32 of 1956); The Hindu Adoptions and Maintenance Act (78 of 1956); The Hindu Succession Act (30 of 1956).

(धृ). Dhru means "to hold". Consequently that which holds (धारयति) is *Dharma*.[9] The expression *Dharma* is of the widest import. The Hindu legal system is embedded in *Dharma*, and Hindu law is a branch of *Dharma*. Since there is no corresponding word, writes Jois in his treatise,[10] for *Dharma*, it defies any definition; it can only be explained as it has a wide variety of meanings.

> "*Dharma* is used to mean justice (*Nyaya*), what is right in a given circumstance, moral, religious, pious or righteous conduct, being helpful to living beings and things, duty, law and usage or custom having the force of law and also a valid *Rajashasana* (royal edict)."

Foundation of all affairs

According to *Taittariya Samhita, Dharma* constitutes the foundation of all affairs in the world, and it is supreme. According to *Jaimini* it is that which is indicated by the *Vedas* as conducive to the highest good and as Madhavacharya[11] said, "*Dharma* is that which sustains and ensures progress and welfare of all in this world and eternal bliss (Moksha) in the other world."[12] The Smritis classified such of the rules of *Dharma* which were purely personal in nature as "Achara (conduct) and those which were to be enforced and observed by the State as civil and criminal law (*Vyavahardharma*) and Constitutional law (*Rajdharma*) respectively''.[13]

Collective wisdom of people

Who propounded *Dharma* is unknown, but it can be regarded as the product of the collective wisdom of the people and accepted as such by the people. In his *Anatomy of Law,* Lon L. Fuller writes[14] that *Dharma* is a special attribute of man. He writes, "In man's capacity to perceive and legislate against his own defects, we can discern his chief claim to stand clearly above the animal level." This very idea has been highlighted by ancient Indian thinkers in *Hitopadesha*[15] that the special attribute of man is his capacity and desire to conform to *Dharma* (the laws made by him which control and regulate his natural impulses and conduct). Bereft of *Dharma* man is equal to an animal. Fuller has rightly observed that the strength of law in the ultimate analysis lies in public acceptance.

As observed in *Ratilal P. Gandhi case*,[16] "religion" is not necessarily theistic and in fact there are well-known religions in India — like Buddhism and Jainism — which do not believe in the existence of God or of any Intelligent

---

9. धारणाद्धर्ममित्याहु: 1-*Mahabharata, Shanti Parva*, 109-9-11 (that which is observed and supported is *Dharma*).
10. M. Rama Jois: *Legal and Constitutional History of India,* Vol. 1, (1984), Chap. 1.
11. He was the Minister to Hakka and Bukka, founder kings of Vijaynagar Empire.
12. M. Rama Jois: *Legal and Constitutional History of India*, Chap. 1, p. 4.
13. M. Rama Jois: *Seeds of Modern Public law in Ancient Indian Jurisprudence*, (1990), p. 9.
14. *Anatomy of Law*, p. 3.
15. *Hitopadesha, Prastavika*, p. 25.
16. *Ratilal Panachand Gandhi* v. *State of Bombay*, AIR 1954 SC 388, 392: 56 Bom LR 1184: (1954) 1 MLJ 718.

First Cause. A religion undoubtedly has its basis in a system of beliefs and doctrines which are regarded by those who profess that religion to be conducive to their well-being, but it would not be correct to say that matters of religion are nothing but matters of religious faith and religious belief. A religion is not merely an opinion, doctrine or belief. It has its outward expression in acts as well.[17] Religion lays down a code of ethical rules for its followers to accept.[18] The word has different shades and colours. Its important shade is *Dharma* (duty). That is, duty towards the society and the soul.[19] As mentioned in clause (*b*) of Article 26, religion includes not only the philosophical side of religion, but also religious practices as laid down in the tenets of any religious sect.[20] It is a term which is hardly susceptible of any rigid definition. It is certainly a matter of faith with individuals or communities and it is not necessarily theistic.[21]

In *Shastri Yagnapurushdasji*[22], the Supreme Court through Gajendragadkar, C.J. observed that it is extremely difficult, though not impossible, to define the Hindu religion in the way the other religions are defined. The reason advanced was that unlike the other religions, Hinduism does not revolve around any one prophet or God, any one philosophy or dogma, or any one mode of worship. Its all pervasive. It embraces numerous views and ways of life.[23] Theists or atheist, idolaters or iconoclasts, those having faith in the *Vedas* or those calling them the works of hypocrites, those believing in the oneness of God or those believing in crores of Gods and Goddesses, those having faith in casteism, or those having pronounced enmity with it, those who believe in temple-worship or those who do not believe in it, or who due to political compulsion do not openly proclaim that they believe in temple-worship[24] etc. can be equally good Hindus.

Sources

About sources of *Dharma* (law or morality), *Manusmriti* states (in *Ch. II*) as follows:

(*i*) "Know that as *Dharma* (sacred law) which is followed and assented to in their hearts, by the virtuous (saints) who are learned (in the *Vedas*) and free from hatred and inordinate attachment or affection." (*Ch. II, Verse 1*).[25]

---

17. *Ratilal Panachand Gandhi* v. *State of Bombay*, AIR 1954 SC 388, 392: 56 Bom LR 1184: (1954) 1 MLJ 718.
18. *Commr., Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, 1954 SCR 1005: AIR 1954 SC 282; *S.P. Mittal* v. *Union of India*, (1983) 1 SCC 51: (1983) 1 SCR 729: AIR 1983 SC 1.
19. *Aruna Roy* v. *Union of India*, (2002) 7 SCC 368, 393 (para 36).
20. *Ram Chandra Deb* v. *State of Orissa*, AIR 1959 Ori 5, 10 [Constitution of India, Art. 26(*b*)]. Also see *Arya Samaj Educational Trust* v. *Director of Education*, AIR 1976 Del 207, 211 [Constitution of India, Article 30(1)].
21. *Pannalal Bansilal Pitti* v. *State of A.P.*, (1996) 2 SCC 498: AIR 1996 SC 1023.
22. *Shastri Yagnapurushdasji* v. *Muldas Bhundardas Vaishya*, AIR 1966 SC 1119.
23. See *CWT* v. *R. Sridharan*, (1976) 4 SCC 489: 1976 HLR 600.
24. *M.P. Gopalakrishnan Nair* v. *State of Kerala*, (2005) 11 SCC 45.
25. विद्वद्भि: सेवित: सद्भिर्नित्यमद्वेषरागिभि: ।
हृदयेनाभ्यनुज्ञातो यो धर्मस्तं निबोधत ।। मनु. 2।1।।

(*ii*) "The entire Veda is the (first) source of *Dharma* (the sacred law), next the *Smritis* (sacred books of the learned saints), next the good conduct of the learned saints, i.e., the customs initiated by holy and learned persons, and (finally) self-satisfaction (i.e., what appeals to one's conscience or by doing which one's conscience does not prick or does not feel any fear, doubt or shame)." (*Ch. II, Verse 6*).[26]

(*iii*) "Whatever law has been ordained for any person by Manu, that has been fully described in the Veda; for he (Manu, the great sage) possessed full knowledge allround." (*Ch. II, Verse 7*).[27]

(*iv*) "The *Veda*, the *Smriti* the good conduct of virtuous men and an action appealing to one's conscience (i.e., justice, equity and good conscience) are evidently declared to be the fourfold means of defining *Dharma* (i.e., the sacred law)." (*Ch. II, Verse 12*)[28]. The same is also provided by the *Smriti* of *Yajnavalkya*. (*Ch. I, Verse 7*).

(*v*) "It is only those who are not attached to the avarice of wealth and addicted to sensuous pleasures that succeed in acquiring the knowledge of *Dharma*; to those who seek the knowledge of *Dharma* (the sacred law), the supreme authority is the Veda." (*Ch. II, Verse 3*).[29]

From the above verses of Manu, the greatest jurist and law giver of Hindu law, it is clear that the principal source of *Dharma* (law) is the Veda, next comes the *Smritis* (other sacred books) of learned sages, also the good conduct of holy saints (leading to good and binding customs) and finally principles of justice, equity and good conscience. It is, therefore, the duty of the Courts in India not to give, while administering justice under Hindu law, any preference to any commentary over the clear text of a *Smriti*, nor to the text of other *Smritis* over that of *Manusmriti*. And, even a clear provision in *Manusmriti* is also to be discarded if it is at variance with the Veda which is acknowledged as supreme authority by all writers of Hindu shastras. Just as no decision of a court can override an express provision of a statute and no statute can override the Constitution of India, or no decision of a High Court can override a decision of the Supreme Court, so no commentary can override the clear text of a *Smriti* nor can any *Smriti* override the Veda. It is only when the Veda or *Manusmriti* is silent on a point that any other *Smriti* or any commentary can be restored to. The *Smriti* of Manu, which is most ancient, explains, as stated above, *Dharma* as enjoined by the *Vedas*.

---

26. वेदोऽखिलो धर्ममूलं स्मृतिशीले च तद्विदाम्।
आचारश्चैव साधूनामात्मनस्तुष्टिरेव च।। मनु. 2। 6।।
27. यः कश्चित्कस्यचिद्धर्मो मनुना परिकीर्तितः।
स सर्वोऽभिहितो वेदे सर्वज्ञानमयो हि सः।। मनु. 2। 7।।
28. वेदः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः।
एतच्चतुर्विधं प्राहुः साक्षाद्धर्मस्य लक्षणम्।। मनु. 2। 12।।
29. अर्थकामेष्वसक्तानां धर्मज्ञानं विधीयते।
धर्मं जिज्ञासमानानां प्रमाणं परमं श्रुतिः।। मनु. 2। 13।।

Subsequently within the last about two thousand years several other *Smritis* came into existence, the most well-known of those being that of *Yajnavalkya*, on which Vignanswara wrote a running commentary, known as *Mitakshara* which came to be regarded as a very high authority in the whole of India except Bengal.[30]

As observed and laid down by Manu,[31] *Ahimsa* (non-violence), *Satya* (truthfulness), *Asteya* (not coveting the property of others), *Shoucham* (purity of mind and body) and *Indriya Nigraha* (control of senses) are in brief the common *Dharma* of all.

Commands

Dharma is promulgated in the form of commands. *Dharma* thus embraces all forms of righteous conduct covering every aspect of life essential for the sustenance and welfare of the individual and society and includes those rules which guide and enable those who believe in God and heaven to attain eternal bliss (मोक्ष).

In Chapter 8, Manu[32] stresses upon the observance of *Dharma* forcefully, saying, "*Dharma* protects those who protect it. Those who destroy it are destroyed." Therefore *Dharma* should not be destroyed so that we may not be destroyed as a consequence thereof.

Classification

Manu classifies *Dharma* under three heads: *Achara* (आचार:), *Vyavahara* (व्यवहार:) and *Prayaschita* (प्रायाश्चित:). *Achara* deals with the behaviour of man in his daily routine. It lays down guiding principles of good behaviour; it gives elaborate rules relating to the course of life from conception to cremation. These principles are descriptive of Hindu social life.

Varnashram

Among these rules, those relating to *Varnashram* (वर्णाश्रम) find a prominent place. The second part deals with sin (पाप) and expiation (प्रायश्चित). These provisions are mainly a matter of religious observance but sometimes they acquired a legal significance in the administration of criminal justice. The third portion deals with *Vyavahara* (व्यवहार) or law properly so called, recognised and administered by King's Courts.

Fragmentation into castes

In early Vedic times, there was no rigid division of society into castes. The word for caste is *Varna* (वर्ण) which means the complexion of the human body. The Vedic Aryans were a race of fair-looking men as opposed to other men of

---

30. Prem Nath Chadha: *Hindu Law*, 4th Edn., (1974).
31. अहिंसा सत्यमस्तेयं शौचमिन्द्रियनिग्रह: ।
एतं सामासिकं धर्मं चातुर्वण्येऽब्रवीन्मनु: ।। *Manusmriti*, Ch. 10, Verse 63, p. 625.
32. धर्म एव हतो हन्ति, धर्मो रक्षति रक्षित: ।
तस्माद्धर्मो न हन्तव्यो मा नो धर्मो हतोऽवधीत् ।। *Manusmriti*, Ch. 8, Verse 15, p. 409.

dark complexion. The social structure, at that period of time was flexible enough to classify men into four divisions: (1) *Brahmins* (priests and spiritual teachers), (2) *Kshatriyas* (fighting forces), (3) *Vaishyas* (merchants and peasants), and (4) *Shudras* (manual workers). Originally the caste was not based on birth but on a man's aptitude and functions. Lord Krishna in his *Bhagwat Gita* categorically declares that divisions of caste are based on merits and functions. With the passage of time the caste system became rigid. Foreign invasions and immigrations began to affect the ways of life and social groups tended to become heterogeneous. The champions of social purity began to build protective walls around their regional social groups and Hindu society came to be fragmented into innumerable divisions and sub-divisions. *Birth instead of function became the ground of caste distinction.*[33]

C. CASTE SYSTEM: ITS HISTORY AND ROLE[34]

The role of caste system has been praised by some and condemned by others. Doctor Kane quotes Sidney Law in his vision of India as under:

> "There is no doubt that the caste system is the main cause of the fundamental stability and contentment by which Indian society has been braced up for centuries against the shocks of politics and sins of nature. The caste organization is to the Hindu his club, his trade union, his benefit society and his philanthropic society."

Meredith Townsend in *Europe and America* states as under: "I firmly believe caste to be a marvellous discovery, a form of socialism which through ages protected human society from anarchy and from the worst evils of industrial and competitive life. It is an automatic poor law to begin with and the strongest form known of a trade union."

The endemic wars that followed, particularly after the 12th century, chaotic conditions and Muslim invasions and occupation of large parts of India brought Hindu society into conflict with foreign rulers and the natural development of the Hindu social order was arrested. Caste became the instrument of survival but it also became an instrument of stagnation. During the middle ages, Europe was under the spell of Christian dogma. Hindu achievements in the field of science and arts which had so far been in advance of those in Europe lagged behind. It was only in Southern India that Hindu civilization and culture retained some of their original splendour: Muslim domination of India ended by about the end of seventeenth century and the rise of Maratha power generated a new sense of confidence[35] which gave a fillip to the growth and spread of Sanskrit learning.

Advent of Britishers and modern renaissance

With the advent of British rule, winds of change began to blow over the country. The country was politically subjugated and economically exploited but the new system of education opened the eyes of Indians to the great

---

33. M.S. Pandit: *Outlines of Ancient Hindu Jurisprudence*, (1989), pp. 3-4.
34. M.S. Pandit: *Outlines of Ancient Hindu Jurisprudence*, (1989), quoted at pp. 4-5.
35. And that is why it was a saying that— शिवाजी न होत तो सुन्नत होत सबका।

advancement of learning in the West. European scholars came across the great intellectual heritage of India. Indians, particularly the Hindus took to the study of the English language and by their scholarly attainments inaugurated a modern renaissance. This revival of interest in ancient learning coupled with knowledge derived from Western learning created a stir in Hindu social fabric. Great reformers realised that they were responsible for the degeneration and fragmentation of Hindu society. The evils of the caste system were too patent to be ignored. Untouchability had disgraced Hindu society. It was in the twentieth century that a great movement in social reform gathered momentum. The evils of foreign rule stirred the people of India to a prolonged struggle for independence which was realized in 1947. The atmosphere was now favourable for a radical change in the structure of the personal law of Hindu society.

Landmark years in History of Hindu Law

The years 1955 and 1956 are landmarks in the history of Hindu law. The four Acts were passed.[36] The Hindu Joint Family was preserved but in a very truncated form, giving female heirs of a deceased Hindu a share in joint family property. The law of succession was drastically altered so as to give equal rights to male and female heirs. The Hindu Marriage Act legalized divorce on liberal terms. "*Rarely in the history of legal evolution such revolutionary changes in the legal system have been enacted in a couple of years and equally rarely have such changes been accepted by a community without any serious opposition. This in itself is a glorious tribute to the resilience and flexibility of the Hindu social order which had so far regulated its family life by the principles enshrined in the Dharmashastra*".[37]

D. HINDU AND HINDU RELIGION

What is meant by the term "Hindu"? To make this term accurate and at the same time sufficiently comprehensive as well as distinctive, observed the Privy Council as far back as 1902, is extremely difficult.[38] The Hindu religion is marvellously catholic and elastic. Its system of religious beliefs and theory (theology) is marked by eclecticism and tolerance and almost unlimited freedom of private worship. It is therefore easier to say who are not Hindus and practically the separation of Hindus from non-Hindus is not a matter of so much difficulty. People know the difference well and can easily tell who are Hindus and who are not.

Though the body and soul of the Hindu religion is found in the *Shrutis* (*Vedas*), *Smritis* and other *Dharmashastras*, yet we do not find the word Hindu in these books. It is a foreign word.[39] It must be marked well that no restrictions are placed by Hinduism on independent spiritual experience by each and every

---

36. Hindu Marriage Act, 1955; Hindu Succession Act, 1956; Hindu Minority and Guardianship Act, 1956; and Hindu Adoptions and Maintenance Act, 1956.
37. M.S. Pandit: *Outlines of Ancient Hindu Jurisprudence*, (1989), pp. 4-5.
38. *Bhagwan Kuer* v. *J.C. Bose*, ILR (1902) 31 Cal 11: 30 IA 249: 7 CWN 895.
39. *Ram Pergash Singh* v. *Dohan Bibi*, AIR 1924 Pat 420: ILR 3 Pat 152.

individual. It does not make the people blind and slavish followers of any *rishi* or *avtar* or prophet or messiah. Hinduism is like science which believes in endless pursuit of progress by new experiments. Hindus therefore do not have a book of religion (like *Koran* or *Guru Granth Sahib*); they have a library of books of religion which is increasing as time passes. The Hindu religion is thus rightly described as a "commonwealth of religions".[40]

Originally — people living beyond Indus

Originally the term "Hindu" was used to denote a designation of nationality and as time passed the word came to signify all the people living beyond the river Indus. "*Indoi*" was the term used by the Greeks to indicate the inhabitants of the Indus valley. Etymologically the term Hindu has a territorial significance which in course of time gave way to religious connotation. The sacred book of the Parsis, *Zend Avesta* described the land of Indus valley as *Hapta Hindu*. The culture and religion of Hindus were called *Hinduism*.[41]

Meaning of Hindu

It was once believed that "*a Hindu is born, not made*". This aphorism is now no more true. It means that the status of a person as a Hindu is determined not by the person himself but by his birth. This general statement has exceptions. The case of *Morarji* v. *Administrator-General of Chennai*[42] has finally pronounced that the term "Hindu" includes those born as Hindus and also those who become converts to Hinduism.

Apart from the fact that the Hindu religion has, in practice, shown much more *accommodation* and *elasticity* than it does in theory, communities so

---

40. It must be remembered that millions of Hindus are domiciled in various countries of the world and they must have added new rituals and new philosophy to Hindu religion. If they return and settle in India, they shall be treated as Hindus.

41. Sanskrit literature describes Hindu Religion as Vedic Religion (वैदिक धर्म). Word "Hindu" is not found anywhere in the *Vedas*, *Mahabharata*, *Bhagwat* and *Manusmriti*. According to one opinion the word "Hindu" originated from the word Indus (सिंधु) river, and Hindu religion was that which was in vogue beyond the river Indus. But this does not seem to be true because the Vedas were written in Afghanistan and some portion of the *Vedas* was written in Punjab. Gandhari, mother of the Kauravas belonged to Kandhar (गांधार). This shows that the Hindus and the Hindu religion existed even on the other (Northern) side of the river Indus. According to other opinion the Muslims, who entered Bharat some 1400 years before named it as "Hindustan". But this also does not seem to be true and possible.

The word "Hindu" should not be understood in its restricted (i.e. territorial and historic) sense. The word "Hindu" has wide connotations. Analysing it from spiritual point of view, a "Hindu" is one whose mind is affected by violence: हिंसया दूयते चित्तम्, स वै हिंदूरीतिवित: ।

Hindu religion has two main components: ब्रह्मविद्या (Atma gyan) and भूतदया (Compassion for every living being). It has no one book as its prime book, no one person as its prime exponent, it is मानवधर्म which is ever lasting (सनातन) and unaffected by time and place. (Vinoba Bhave's article in *Jana Kalyan* monthly magazine, January 2003, pp. 35-37.)

42. (1929) 52 Mad 1960: 11 IC 364.

widely separated in religion as Hindus, Jains and Buddhists have followed substantially the broad features of Hindu law as laid down by the *Smritis*.[43]

A person may be a Hindu by birth or by conversion. A mere theoretical allegiance to the Hindu faith by a person born in another faith does not convert him into a Hindu, nor is a bare declaration that he is a Hindu sufficient to convert him to Hinduism. But a bona fide intention to be converted to the Hindu faith, accompanied by conduct unequivocally expressing that intention may be sufficient evidence of conversion. No formal ceremony for the purpose is necessary.[44]

A Hindu is a person who follows the Hindu religion in any of its form and developments including a follower of the Brahmo, Prarthna, or Arya Samaj, or a Virashaiva or Lingayat. Children of Hindu parents are also Hindus and so also are converts or reconverts to the Hindu religion.

Four castes

The Hindu are divided into four castes[45], namely:—

(*i*) The *Brahmins*,

(*ii*) The *Kshatriyas*,

(*iii*) The *Vaishyas*, and

(*iv*) The *Shudras*.

Each of these castes is further divided into a number of sub-castes. Converts to Hinduism are regarded as Shudras.[46]

Not dependent upon birth, but on actions

The Hindu *Shastras* enjoin that caste in Hinduism is not dependent upon birth, but upon actions, and a *Shudras* may by his actions, raise himself to the position of a *Vaishya*, *Brahman* or *Kshatriya*.[47] But the Hindu law as administered in the courts in India differs from the same for the evil of recognising caste on the ground of birth alone has been deep-rooted in the Hindu society since it gave up study of *Vedas* and old *Shastras*, though due to modern social reforms initiated by the great religious and social reformer Swami Dayanand Saraswati, this evil is being removed.

As held in *V.V. Giri* v. *Shri Dora*[48] unilateral acts of one party cannot be easily taken to prove that the claim for the higher status which particular acts

---

43. J.D. Mayne: *Hindu Law*, 10th Edn., Chap. 1, para 5(*a*), p. 5.
44. *Perumal Nadar* v. *Ponnuswami*, (1970) 1 SCC 605: AIR 1971 SC 2352.
45. The present trend is to obliterate the legal distinction and discrimination between castes. But in economic and political field the trend is otherwise, i.e. trend to accentuate this difference (by providing reservations) for the sake of power-catching.
46. *Muthusami* v. *Musilamani*, 33 Mad 342.
47. Manu, Chap. 10, Verse 65, Sutras 1 and 2; see also *V.V. Giri* v. *Shri Dora*, AIR 1959 SC 1318.
48. AIR 1959 SC 1318: (1960) 1 SCR 426.

purport to make is established and hence a person belonging to a scheduled caste cannot, by the mere act of becoming an officer in the Army, be raised to the status of *Kshatriya*.[49]

Converts

If a person born in a particular caste becomes an Arya Samajist[50] or a convert to *Mahanubhava Panth* of a *Mahar*,[51] he does not merely by such an act cease to retain the caste (in which he was born) for the purposes of the Constitution (Scheduled Castes) Order, 1950. The court is not really concerned with the theology of the new order; what it has to determine are the social and political consequences of such conversion, and that must be decided in a common sense and practical way rather than on theoretical or theocratic grounds. In *Chatturbhuj Vithaldas case*[52] the Supreme Court observed that:

> "Looked at from the secular point of view there are three factors which have to be considered: (1) the reactions of the old body, (2) the intentions of the individual himself and (3) the rules of the new order. If the old order is tolerant of the new faith and sees no reason to outcast or excommunicate the convert and the individual himself desires and intends to retain his old social and political ties, the conversion is only nominal for all practical purposes and when we have to consider the legal and political rights of the old body the view of the new faith hardly matters."
>
> "The new body is free to ostracise and outcast the convert from its fold if he does not adhere to its tenets, but it can hardly claim the right to interfere in matters which concern the political rights of the old body, when neither the old body nor the convert is seeking either legal or political favours from the new as opposed to purely spiritual advantage."
>
> "On the other hand if the convert has shown by his conduct and dealing that his break from the old order is so complete and final that he no longer regards himself as a member of the old body and there is no reconversion and re-admittance to the old fold, it would be wrong to hold that he can nevertheless claim temporal privileges and political advantages which are special to the old order."

Arya Samajists

Arya Samaj, unlike Christianity or Islam, is not a new religion entirely distinct from Hinduism and mere profession of Arya Samajism by a person does not make him cease to be a Hindu, and cannot have the effect of excluding him from Hinduism or from the caste of his birth.[53] Thus the mere fact that a person

---

49. AIR 1959 SC 1318: (1960) 1 SCR 426.
50. *B. Shyamsunder* v. *Shanker Deo Vedalankar*, 21 ELR 303: AIR 1960 Mys 27.
51. *Chatturbhuj Vithaldas Jasani* v. *Moreshwar Parashram*, AIR 1954 SC 236.
52. *Ibid.*
53. *B. Shyamsunder* v. *Shanker Deo Vedalankar*, 21 ELR 303: AIR 1960 Mys 27.

belonging to a scheduled caste has become an Arya Samajist does not make him cease to be a member of that caste.[54] There cannot, in the absence of intentional abandonment or renunciation of that caste by that person or expulsion or excommunication by a person belonging to the caste in which he was born, be any deprivation or loss of caste.[55]

In considering the question whether a person born as a Hindu abandons the caste of his birth by professing to belong to Arya Samaj, the court is not concerned with the theology of the Arya Samaj as propounded by the witnesses in the case.[56] What the Court is really concerned with is the determination of the social and political consequences of a conversion, if it can be said that a conversion takes place when a person born in a particular caste becomes an Arya Samajist.[57] The question must be decided in a common sense and practical way rather than on theoretical and theocratic grounds.[58]

Effect of conversion

In deciding the effect of conversion to Mahanubhava Panth of a Mahar under Article 330(1)(*a*) of the Constitution, the court is not really concerned with its theology.[59] Whatever the views of the founder of the Mahanubhava sect may have been about caste, it is evident that there has been no rigid adherence to them among his followers in later years. They have either changed their views or have not been able to keep a tight enough control over converts who join them and yet choose to retain their old caste, customs and ties.[60] Present day Mahanubhavas admit to their fold persons who elect to retain their old caste customs. That makes easy for the old caste to regard the converts as one of themselves despite the conversion which for all practical purposes is only ideological and involves no change of status.[61] Conversion to this sect imports little beyond an intellectual acceptance of certain ideological tenets and does not alter the convert's caste status, at any rate, so far as the householder section of the Panth is concerned.[62]

Even though as a result of custom, usage or practice or of sacramental precept, Sudras might have been considered to be incapable of entering into the order of Sanyasam at one time, such disqualification ceased to exist long ago and can no longer be held to exist now.[63]

---

54. *B. Shyamsunder* v. *Shanker Deo Vedalankar*, 21 ELR 303: AIR 1960 Mys 27.
55. *Ibid.*
56. *Ibid.*
57. *Chatturbhuj Vithaldas Jasani* v. *Moreshwar Parasram*, AIR 1954 SC 236: 1954 SCR 817.
58. *Perumal Nadar* v. *Ponnuswami*, (1970) 1 SCC 605: AIR 1971 SC 2352: (1971) 1 SCR 49; *Raman Nadar* v. *Snehappoo*, (1969) 3 SCC 42: AIR 1970 SC 1759.
59. *Ibid.*
60. *Ibid.*
61. *Ibid.*
62. *Ibid.*
63. *Shri Krishna Singh* v. *Mathura Ahir*, 1972 AL

E. HINDUISM

What is

Hinduism is commonly spoken of as one of the religions. It has no monolithic structure and does not prescribe any mode of worship. It does not lay down and prescribe any belief in the nature of divinity. For spiritual realization there are various means and methods. Even atheist philosophers have secured their place in the galaxy of philosophers. Consequently Hinduism cannot be taken as a religion. Hinduism is a way of life, it is not a creed or a formula or a creation of any single prophet; it is a cultural harmony; it is a federation of faiths; one reality in many forms.

It is a trio of principles

Hinduism is a way of life in the subcontinent. It is not limited to narrow limits of religion.[64] It is the trio of *Rita* (ऋत), *Satya* (सत्य) and *Dharma* (धर्म). *Rita* is the principle governing the uniformities of nature. *Rita* is etymologically connected with "Right". This universal law of nature was identified with truth (सत्य). This concept of *Rita* bears a very close resemblance to the natural law of the ancient Greeks.[65] It is therefore rightly said[66] that lawyers and laymen interested in the study of Ancient Hindu law should not compare it with modern legal systems of Europe, America or India. It can be compared favourably with the legal systems of ancient Greece and Rome and the medieval systems of England and Europe.

Hinduism embraces within itself so many diverse forms of beliefs, faiths, practices and worship that it is difficult to define the term "Hindu" with precision. There is very little common in the diverse forms of beliefs except a vague faith in what may be called the fundamentals of Hindu religion.[67]

Four Codifying Acts

Under the codifying Acts[68] the orthodox concept of the term "Hindu" has undergone a radical change and it has been given an extended meaning. These Acts apply to Hindus by birth or religion, i.e. converts to Hinduism and also to a large number of other persons. Any child, legitimate or illegitimate, one of whose parents is a Hindu by religion and who is brought up as a Hindu is a Hindu. Hence legitimate children of a Hindu father by a Christian mother who are brought up as Hindus would be governed by Hindu law.[69]

---

64. *Ramesh Yeshwant Prabhoo* v. *Prabhakar Kashinath Kumte*, (1996) 1 SCC 130: AIR 1996 SC 1113. See also *Shastri Yagnapurushdasji* v. *Muldas Bhundardas Vaishya*, (1966) 3 SCR 242: AIR 1966 SC 1119.
65. M.S. Pandit: *Outlines of Ancient Hindu Jurisprudence*, (1989), p. 1-2.
66. *Ibid.*, Preface p. vi.
67. *CWT* v. *R. Shridharan*, (1976) 4 SCC 489, 493.
68. The four Acts.
69. *CWT* v. *R. Shridharan*, (1976) 4 SCC 489, 493.

Acceptance of the *Vedas* with reverence; recognition of the fact that the means or ways to salvation are diverse; and realisation of the truth that the number of Gods to be worshipped is large, that indeed is the distinguishing feature of Hindu religion. Hindu religion can be safely described as a way of life based on certain basic concepts referred to above.[70]

It is the release and freedom from the unceasing cycle of births and rebirths; Moksha or Nirvana, which is the ultimate aim of Hindu religion and philosophy, represents the state of absolute absorption and assimilation of the individual soul with the infinite.[71]

The Constitution-makers being aware of this comprehensive character of the Hindu religion, while guaranteeing the fundamental right to freedom of religion, Explanation II to Article 25 has made it clear in sub-clause (*b*) of clause (2), that reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.[72]

F. JAINISM AND HINDU RELIGION: DIFFERENCE BETWEEN

Words "Hindu" and "*Dharma*" have been explained before. There lies a subtle difference between the words सभ्यता, संस्कृति and धर्म (civilization, culture or refinement and religion). Each word has its special connotation.

Worship (पूजा) and prayer (प्रार्थना) is a part of *Dharma*. Method of worship and prayer is *civilization* (सभ्यता) and to worship and pray without obstructing or harassing others is politeness or good manners which breeds *culture* (संस्कृति).

Jain *Dharma* is an independent dharma. It is not a branch or sect of Hindu dharma, like Shaivaits, Vaishnavites and Swaminarayan sects. A number of convincing reasons can be advanced for this purpose as under:

(*a*) Jain *Dharma* existed even before the period when the word "Hindu" came in vogue in Āryāvartā.

(*b*) The word "Jain" is referred to in various holy books while in 45 Āgamas (आगम) of Jains which contain about eleven lakhs of stanzas there is not even a single reference about the word "Hindu".

(*c*) There is no authoritative definition of "Hindu *Dharma*" till now while the definition of "Jain *Dharma*" is well-known to the learned all over the world.

(*d*) The word Hindu as observed by the Supreme Court of India denotes and represents a particular lifestyle and not any religion of that name. The religion known presently as Hindu religion has its sources in *Vedas* and Vedic traditions. On the other hand, the roots of Jain *Dharma* are not at all found in the *Vedas*.

---

70. *Shastri Yagnapurushdasji* v. *Muldas Bhundardas Vaishya*, AIR 1966 SC 1119, 1131.
71. *Ibid.*
72. *Ibid.*

(*e*) Thus the origin and development of Jain *Dharma* has nothing to do with Hindu *Dharma* and it has not even a distant relation with it.

(*f*) Beliefs obtaining in Hindu and Jain *Dharma* are quite different. For example, Hindus believe that Almighty, the God, is born in every age (युग). Jains accept the Tirthankara (तीर्थंकर) as an extraordinary person and not further.

(*g*) Jains believe and follow Ahimsa (non-violence) while previously the Hindu religion openly advocated, supported and justified violence. A male-buffalo was offered to Devi and sacrificed in the temple by Hindus at many places. Jains never dream of such a violent act.

(*h*) Evidently therefore, the Jain Tirthankar has no weapon in his hand but he appears in a calm and peaceful position sitting in *Padmasana*, a yogic posture. On the other hand almost every Hindu deity bears some kind of weapon in his hand.[73]

Thus there is a great difference between Hindu religion and Jain religion (Jainism).[74]

G. CHARACTERISTICS OF HINDUISM

Tolerance and adaptation, and accommodation

Tolerance or a relative capacity to endure or adapt psychologically to an unfavourable environmental factor was the high watermark of Hinduism. Hindu culture was assimilative in that it absorbed and digested into its system all foreign cultures without ado. Under a plurality of forms, Hinduism believed in the unity of spirit. As expounded by the sacred Bhagwat Gita this doctrine stands unaltered. It says "as water falling from the sky goes to sea so worship in whatever form reaches the Supreme Lord". The religion, according to a Hindu, was not a dogma or something held as an established opinion or a definite authoritative tenet which is unalterable, but it is insight or experience. Tolerance, freedom from dogma and accommodation are thus the outstanding characteristics of Hinduism which lent it strength to survive waves of foreign invasions on the country. As observed by the Privy Council[75] Hinduism is "marvellously catholic and elastic. Its theology is marked by eclecticism and tolerance and almost unlimited freedom of private worship". The Supreme Court of India, in *Shastri Yagnapurushdasji case*,[76] has brought forth this distinctive feature of the Hindu religion: "Acceptance of the *Vedas* with

---

73. The definition of Hindu as हिंसाया दूयते इति हिन्दु (one who is offended by violence) came into vogue only in the 13th century of Vikram and that was due to efforts of the great Jain Muni of Gujarat (Pātan) Kalikal Sarvagna Hema Chandracharya —कलिकाल सर्वज्ञ हेमचंद्राचार्य.
74. *Gujarat Samachar Daily*, 21-9-2006. From the statement of Jain Muni Mitranand Sagarji Maharaj. *See also* Article 25(2) of the Constitution.
75. *Bhagwan Koer* v. *Bose*, ILR (1904) 31 Cal 11 (PC).
76. *Shastri Yagnapurushdasji* v. *Muldas*, AIR 1966 SC 1119. This formula as noted by S. Venkatraman in his *A Treatise on Hindu Law*, was evolved by Tilak and adopted by Gajendragadkar, C.J. in this case.

reverence; recognition of the fact that the means or ways to salvation are diverse; and realisation of the truth that the number of Gods to be worshipped is large, this indeed is the distinguishing feature of Hindu religion."

Joint Family

Hindu law differs from other legal systems of the world in yet another respect and that is its system of joint family, the law of adoption, and the rules of succession and inheritance. The law of *Dharmashastras* is a mixture of morality, religion and law. It is for this reason that the fundamental legal concepts of Hindu law are based on Hindu religion.

Medhatithi's view

"The characteristic of *Dharma* is that it enjoins a person to do a duty (कर्त्तव्य)"—says Medhatithi, the renowned commentator of Manu. The command to perform a duty may arise from various sources of law. The command may take the form to do something (विधि) or not to do something (निषेध). This stresses the positivist aspect of western legal theory which lays stress on command as enjoined by some authority. It ignores the element of purpose for which the law exists. The main contention of Greek and Roman philosophers and jurists, down to modern days, is that law is to be viewed, not merely as a command but as an instrument of some purpose to be achieved.[77] And this purpose is to secure order and justice in the society.

Kanad's view

Kanad (कणाद) views that law is the instrument of realising material (अभ्युदय) and spiritual (निःश्रेयस) well being. Moral well-being is a step to spiritual well-being and therefore it secures happiness — material, moral and spiritual. Thus, there is a close similarity between the Western theory of natural law and the Hindu theory of *Dharma*. But how do you secure the moral and material well-being of the individual and the society? The answer to this is found from the ancient Greeks and Romans who enunciated the doctrine of *suum cuique tribuere*[78]. Mahabharata also says the same.[79] Consequently, non-violence, truthfulness, not depriving others of their property, purity and restraining one's senses are universal rules of conduct common for all men (called सामान्य धर्म). Particular conduct (विशेष धर्म) consists of rules of conduct to be observed by men under special circumstances.[80]

Note: *See* Appendix A.

H. ORIGIN

Hindu law is believed to have a divine origin. The *Vedas* are considered as *ipsissima verba* that is of divine revelation or spoken by the Gods themselves.

---

77. "It is a science of social engineering" — Roscoe Pound.
78. Meaning, "rendering to everyone his own".
79. "Do not do unto others what you would not like to be done to yourself."
80. M.S. Pandit: *Outlines of Ancient Hindu Jurisprudence*, p. 6.

They are *Apaurusheya*[81] (अपौरुषेय) or not of the authorship of man but of divine origin. Infusion of superhuman origin served to secure its stability and enforcement. Even the kings were not above it. And this was the eternal *Dharma*, the beacon light. Thus, Law according to Hindus is a branch of *Dharma*.

Law was recognised as a mighty instrument necessary for the protection of individual rights and liberties. An injured individual could seek the protection of law with the help of the king, however powerful his opponent (wrongdoer) might be. The king's power was the sanction behind the law which could compel implicit obedience to the law. The place of law was high, above all. As an early text[82] recites:

> "Law is the king of kings;
> Nothing is superior to law;
> The law aided by the power of the king
> enables the weak to prevail over the strong."

Thus the king was not a law-maker or law-giver but law-upholder,[83] and this was the glory of *Dharma*.

The roots of Hindu law lie in customs and conventions of persons learned in *Dharma*, says Apastamba,[84] and custom is *Sadachara*. *Sadachara* is the usage or moral conduct of virtuous men. Manu defines *Sadachara* as "the custom handed down in regular succession since time immemorial among the four chief castes (Varna) and the mixed races of the country". *Sadachara* is thus approved usage.

There are two views as regards the origin of Hindu law. The first view states that it is of "divine origin" while the other one states that Hindu law is based upon "immemorial customs and usages". According to the first view, since Hindu Law is derived from revelations from the Almighty (i.e. the laws of God) it binds the sovereign as well as his subjects. Law is the king of kings. It is far more powerful and rigid than them. Nothing can be mightier than the law by whose aid the weak may prevail over the strong. This shows that to the Hindus the theory of Rule of Law is not new.

According to the second view Hindu law is based upon immemorial customs and usages. But this is not wholly correct. Publication of criminal textbooks along with Commentaries and Digests and research therein have shown the above view as incorrect. Jurists of modern Europe say that since the theory of "Law as a command of the Sovereign" does not fit in with Hindu law it is not law. But one should remember that so long as a Hindu king occupied the throne of the Hindu community, the Brahmins enjoyed the legislative power,

---

81. अपौरुषेया: वेदा:
82. *Satapatha Brahmana*, XIV: 4.2-23; Rama Jois: *Legal & Constitutional History of India*, Vol. 1, (1984), Chap. 2.
83. *Katyayana Smriti*, 45, quoted by Jois, at p. 13, *Legal & Constitutional History of India*.
84. *Dharmasutra*, 1-1-1-1.

and commands issued by them were generally obeyed. One may say therefore that the system of Hindu jurisprudence has shown no sign of decrepitude.

I. HINDU LAW: HOW FAR APPLICABLE

A question may be posed that under what authority is Hindu law made applicable to Hindus and how far it is made applicable.

Under British rule the statutes of British Parliament and local legislation regulated the application. Though their language varied there was substantial agreement in provisions of these enactments. Throughout British India questions relating to succession, inheritance, marriage and Hindu religious usages and institutions were to be decided according to Hindu Law. Besides, in certain matters such as adoption, guardianship, family relations, will, gifts and partitions, Hindu Law was applied by virtue of express legislation or on principles of justice, equity and good conscience. This was achieved by various civil courts' Acts and different provisions (as they were then) as regards Calcutta, Chennai and Mumbai (the presidency towns). This was implemented by Section 223 of the Government of India Act, 1935 which embodied Section 112 of the Act of 1919.

After India won freedom from British yoke, the Constitution of India in Article 372 provided that "*all the laws in force in the territory of India immediately before the commencement of this Constitution (i.e. before the 26th of January, 1950) shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority*". Thus the old statutory provisions directing the application of the Hindu law to Hindus continue to operate even now.

The whole of pure Hindu law is not applied to Hindus. It is in matters shown above that it is made applicable except in so far as these rules are varied or modified by legislation. It has to be noted that there is no general territorial law governing matters and hence the application of Hindu law. While in case of crimes, transfers, contracts, procedure, etc. there is only one set of rules governing various communities, whether they are Hindus, Muslims, Buddhists or Christians; in the branch of personal law we have one set of rules for the Hindus, another for Muslims, a third for Buddhists and a fourth for the Christians domiciled in India. There are therefore several concurrent systems, the application of each one depending upon the religious persuasion of the parties to a transaction. These give rise to judicial proceedings. The Indian Succession Act, 1925 of course, purports to be the general territorial law of India but, looking to Sections 29 and 58 thereof, one finds that important communities of India have been exempted from its operation. The Act is thus robbed of its general character.

Article 14 of the Constitution of India guarantees equality before the law and Article 15 prohibits discrimination only on grounds of religion, race, caste, sex, place of birth or any of them. However the Hindu law prescribes different rules for Shudras, the fourth class of the four-fold caste-division of the Hindus, than those prescribed for the other three classes. These rules, though liberal

towards Shudras, one may be tempted to say that they violate Articles 14 and 15 of the Constitution. However considering the decision (though given on another matter) of the Mumbai High Court[85] it could be said that they may be regarded as not offending the Articles abovesaid. *This goes to establish that Hindu law is not so static or so inelastic that in interpreting the texts, the courts are powerless to mould it to meet situations not contemplated at the time when it was declared and in the light of the consciousness of the society.*[86]

---

85. *State of Bombay* v. *Narasu Appa Mali*, AIR 1952 Bom 84.
86. *Shantabai Baburao Kalbhor* v. *Ramachandra Khanderao Karhale*, ILR (1959) Bom 1120: AIR 1960 Bom 408.

Chapter II

Sources and Operation

SYNOPSIS

A. General
   1. *Shrutis* or *Vedas*
   2. *Smritis* or *Dharmashastras*
      (*a*) *Sutras*
      (*b*) *Puranas*
      (*c*) Where texts of *Smritis* differ
   3. Comparison with Muslim law
   4. Commentaries and Digests
   5. Judicial Decisions
      Duty of Courts
   6. Legislation
      Enactments modifying, abrogating and supplementing the Hindu law
   7. Custom or usage (Sadachar)
      (*a*) Definition
      (*b*) Essentials
      (*c*) Onus of proof and discontinuance of a custom
      (*d*) Custom and Usage
      (*e*) Types of customs
      (*f*) Judicial notice of a custom
   8. Equity, Justice and Good Conscience
   9. Text-Books

B. Schools of Hindu law
   Authority of the works

C. Differences between the *Mitakshara* and the *Dayabhaga* Schools

D. Effect of legislation

E. Persons governed by Hindu law

F. Migration and its effect

G. Codification

H. The Doctrine of *Factum Valet*

A. GENERAL

The direction of the legislature that the rules of Hindu law should be applied to Hindus in matters specified above supplies the formal source of law to these rules. This direction is, one may say, a political sanction behind these rules. It puts an end to a controversy which once existed among scholars as regards the reality and propriety of the term "Hindu law".

At one time some European scholars believed that the term "Hindu law" was a misnomer and that the rules in question were mere religious injunctions contained in the writings of religious heads of the Hindus who had nothing to do with temporal matters, lacked political sanction and did not satisfy the Austinian analysis of "Law". The term "Hindu law" was therefore "a mere phantom of the brain imagined by Sanskritists without law and lawyers without Sanskrit". Two Tagore Law Professors, Dr Raj Kumar Sarvadhikari and Sir Gurudas Banerjee took up cudgels against this.

As regards the "material" sources[1] of Hindu law we have—

(1) The *Shrutis* or *Vedas*;

(2) *Smritis* or *Dharmashastras*;

(3) Comparison with Muslim law;

(4) The Commentaries on the *Smritis* or *Nibandhas* and Digests;

(5) Judicial decisions;

---

1. *Pudiava* v. *Pavanasa*, ILR (1922) 45 Mad 949 (FB).

(6) Legislation; and

(7) Customs and usages.

For the sake of convenience and clarity these sources could be classified into two categories:

A. Ancient sources; and

B. Modern sources

The *Shruti* (that which was heard), the *Smriti* (that which was remembered), the Commentaries and Digests and customs are ancient sources, while Items (5) and (6), judicial decisions and legislation, are modern sources. Some writers consider the concept of equity, justice and good conscience as a modern source of Hindu law; however, as is evident by the expression "*Priyamatmanah*" in *Manusmriti*,[2] the concept already existed in those times.

The *Shruti* and the *Smriti* are considered to be the original sources of Hindu law. The former are supposed to be actual utterances of the creator, the *Ipissima Verba* of the divine revelation. The latter, although divine in origin, are expressed in the language of ancient sages.[3]

1. Shrutis or Vedas

Shruti or *Veda* is that which has been heard by the inspired sages; it is what is known by revelation.[4] It is the language of divine revelation containing the very words of God.[5] *Vedas* are therefore infallible and constitute the supreme authority by all law-givers. They contain the root and the original sources of *Dharma*. As expressed by Manu[6] *Shrutis* and *Smritis* contain and lay down *Dharma*. The later and less orthodox writers do not refer to the *Shrutis* at all as a source of positive law.[7]

The Vedas are four in number[8]—

(*a*) Rgveda;

(*b*) Yajurveda;

(*c*) Samaveda; and

(*d*) Atharvaveda (or Atharvanveda).

The Rgveda is the oldest and consists of hymns and songs in praise of the forces of nature. The Yajurveda deals with rituals and sacrifices and the

---

2. *Manu*, 2, 12.
3. *Shri Balusu* v. *Shri Balusu*, 22 Mad 398.
4. V.S. Apte: *Sanskrit-English Dictionary*, (1965), p. 566.
5. It is a misconceived belief or superstition that their forefathers were messiahs or prophets and had revelation from God.
6. *Manu*, 2, 10.
7. They are Narada and Brihaspati. A.M. Bhattacharjee in his *Hindu law and the Constitution*, 2nd Edn., (1994), p. 6, reiterates this proposition.
8. The *Shrutis* or *Vedas* contain almost nothing of *Vyavahar* or law. Yet the Vedas are considered as the basis of law. Thus sources of *Dharma* are cited as sources of law, mixing up the two.

"*mantras*" in this connection. A "*mantra*" is a sacred prayer addressed to any deity. The Samaveda contains prayers composed in metre and set to music. The Atharvaveda is devoted to magic, spells and incantations.

These "*Vedas*" contain only the fundamental principles of Hindu law and it must be remembered that the Hindu law prevailing at present amongst Hindus is not exactly the same as enjoined by the Vedas. Gradual departure from the Vedic tenets or principles brought several evils in this law and modern legislation tries to remedy them. For example, the Vedas did not allow polygamy or child marriage. The practice came into vogue amongst the Hindus within about the last two thousand years. The Hindu Marriage Act, 1955, puts an end to this evil.

The *Shruti* consists of four *Vedas*, the six *Vedangas* and the *Upanishads*. The *Vedangas* are appendages to the *Vedas*. These contain very little of law, properly so called. They contain facts from which rules may be inferred. The *Dharma Sutras*, when they quote from the *Vedas* on the subject of law, express juridical construction of utterances, originally absolutely irrelevant.

The Hindu law, which prevails at present, is not exactly the same as enjoined by the *Vedas*. A departure from the Vedic tenets had brought about several evils in the Hindu law, which the modern legislation is trying to remove. The *Vedas* did not allow polygamy or child marriage, but the same came into vogue amongst the Hindus within the last about 2000 years. Now the Hindu Marriage Act, 1955, has put an end to these evils.

2. Smritis or Dharmashastras

The term "*Smriti*" means "recollections", or the quintessence of traditional conduct or the remembered wisdom of the race. The basis of the *Smritis* is the *Shruti*. They are human creations. Since *Shrutis* contained little of positive law, the *Smritis* constituted the principal source of Hindu law.

They constitute the basic structure of Hindu law and lay down or declare the rules and precepts of *Dharma*. The *Smritis* are called *Dharmashastras* and this word is very wide, connoting more than mere law books. *Dharmashastras* are systematised knowledge; its injunctions being religious, moral, social and legal.

Manu the ancient Hindu law-giver mentions four sources of *Dharma* or law[9] — (1) The *Vedas*, (2) The *Smritis*, (3) The conduct (or customs) of the virtuous, and (4) one's own conscience. The verse says: "The *Vedas*, the *Smriti*, the approved usage and what is agreeable to one's soul (or good conscience) the wise have declared to be the quadruple direct evidence of *Dharma* (law)." *Yajnavalkya Smriti*[10] states to the same effect. According to Gautam, *Dharmasutra*[11] administration of justice shall be regulated by the *Veda*, the

9. *Manusmriti*, Chap. 2, Verse 6.
10. Chap. 1, Verse 7.
11. Rama Jois: *Legal and Constitutional History of India*, Vol. 1, p. 14.

institutes of the sacred law, the *Vedangas* and the *Puranas*. Customs of countries, castes and families which are not opposed to sacred laws also have authority. *Brihaspati Smriti* also expresses to this effect.

The *Smritis* are considered to have emanated from the deity in the sense that though they are not in the very words of God, they embody what the sages remembered from revelations. The *Smritis* thus imply human authorship, introducing human agency in the declaration of the law, which is both substantive and procedural.

The *Smritis* are many in number and all of them have not been traced, but among them the Manu *Smriti* stands the foremost. *Yajnavalkya Smriti*, *Narada Smriti*, *Parashara Smriti* and *Brihaspati Smritis* are more important as the law could be ascertained from them. Yagnavalkya has mentioned twenty Smriti writers.[12]

Rules laid down in *Smritis* are those of (*i*) आचार, (*ii*) व्यवहार and (*iii*) प्रायश्चित्त. *Achara* is very close to morality, *Vyavahar*, depicts those rules which the king or the state applied in settling disputes in the administration of justice and *Prayashchit* is the rule of penal provisions for commission of a wrong. *Prayaschit* can well be said to be a sanction for securing observance of rules.

To solve the riddle of conflicting opinion between rules of various *Smritis*, the commentators laid down certain rules of interpretation.

Dharmashashtra is different from Arthashastra.[13] The latter is political science and is not a source of law.

Smritis are of two kinds: (*i*) the *Sutras*, and (*ii*) the *Dharmashastras*.

The *Sutras* are earlier in point of time, compared to *Dharmashastras* which appeared later in point of time.

(*a*) ***Sutras.***—A sutra is a pithy statement, being unambiguous, substantial, universal and logically sound — so say the Pundits or the *Sutravidas*.[14]

Sutras are thus the aphorisms of law (*Dharma*). They are short, pithy formulations of broad and general principles of common sense and justice and are concise in expression, comprehensive in meaning and very easily rememberable. To facilitate the process of remembering the traditional rules of *Dharma* and rules for the special observance of each group the *Sutras* came to be formulated.

---

12. These *Smriti* writers are: मनु, अत्रि, विसतु, हरित, याज्ञवल्क्य, अुशनस, अंगिरा, यम, आपस्तम्ब, संवर्त, कात्यायन, बृहस्पति, पाराशर, व्यास, शंख, लिखित, दक्ष, गौतम, शनपथ, and वसिष्ठ। Complete list cannot reliably be given. पैठिनिसि and स्मृतिचन्द्रिका mention the number as thirty five. नीलकंठ has quoted from ninety-seven Smritis. बौधायन and नारद are also illustrious *Smriti* writers. Medhatithi's Manubhashya (मनुभाष्य) was written in 9th Century A.D., Govindraj's the Manuteeka (मनु टीका) in 12th Century A.D., The Sarvagna Narayan's मानवर्थावित्ति, in 14th Century A.D. and Kulluka Bhatta's. मानवर्थ मुक्तावली was written in 15th Century A.D. (Other Commentators are also there).
13. Kautilya's (Chanakya) *Arthashastra*.
14. *See* Gandhi: *Equity, Trusts and Specific Relief*, (1993), p. 36.

Sutras fall into 3 classes:

(*i*) The *Srauta Sutras* (dealing with rituals);

(*ii*) The *Grihya Sutras* (dealing with domestic ceremonies); and

(*iii*) The *Dharma Sutras* (dealing with law).

These *Dharma Sutras* served as a basic background for the *Dharmashastras* to come up.

Dharma Sutras of *Gautama*, *Baudhayana*, *Apastamba*, *Vashishtha* and *Vishnu* are the principal extant in *Dharma Sutras*. *Apastamba* displays modernity of outlook and denounces the practice of *Niyog* or vicarious progeniture. Vishnu's exposition is in prose and at times in poetry or metrical verse. He deals with rules of civil and criminal law. A notable feature of his work is that sometimes he proves to be a forerunner of his time: according to him after the death of the father, when there is partition among the brothers, not only is the mother entitled to share equally with the sons, but the unmarried sisters are also entitled to their aliquot shares.[15]

(*b*) ***Puranas***.—*Puranas* are Codes which illustrate the law by giving examples of its application. In *Ganga Sahai* v. *Lekhraj*[16] the Allahabad High Court has observed that the place of the *Puranas* is either between Shrutis and *Smritis* or more probably after them. *Puranas* are reckoned by Colebrook as a supplement to the Scripture and they constitute a fifth *Veda*. There are eighteen *Puranas*, eighteen *Uppurana* (उपपुराण), and eighteen *Upopurana* (उपोपुराण). They explain and illustrate law.

(*c*) ***Where texts of Smritis differ***.—In case of conflict between the texts of *Smritis* various methods to resolve the same were invented: (*a*) If *Smriti* says a different thing than what Manu has said, it is to be discarded (*Brihaspati*); (*b*) In case of conflict between *Smritis*, the decision should be arrived at by means of reason, i.e. *Yukti* (*Narada*); (*c*) Party to a dispute may prefer one of them (*Jaimini*), or (*d*) The *Smriti* which follows *Nyaya* or equity should prevail.

Thus, in case of conflict, *Smritis* yielded to the authority of the Vedas or *Shruti*. The conduct of the virtuous or the rule of guidance to be deducted from the practice of men learned in the *Vedas*, occupied in the beginning a subsidiary and secondary place only, but as Hindu jurisprudence developed, the importance of this source in the guise of customs increased and it increased to such an extent that it acquired an overriding authority over the *Shruti* and the *Smritis*. This place is occupied by it even today provided its validity is established by undergoing certain tests and the courts recognise it.

Where no guidance was available from any of the first three sources, an individual who was free from hatred and inordinate affections was free to follow the promptings of his own conscience. This may be termed as the light of reason. It is a subsidiary source of law and its exercise was limited because of

---

15. Vishnu, 18: 35.
16. (1887) ILR 9 All 253.

its indefiniteness. In course of time, however, it died a natural death. Moreover, on grounds of public policy, its authority would not be recognised. Such liberty or freedom is given to a judge exercising his discretion at the time of administering justice. In case of absence of authority the Judge would decide according to the principles of justice, equity and good conscience. However as decided by the Privy Council[17], justice, equity and good conscience do not mean the Judge's private opinion as to what is right or wrong but they mean the rules of English law in so far as they are applicable to Indian conditions.

3. Comparison with Muslim law[18]

It is quite interesting to note that original Muslim law also recognised four sources of law:

(*i*) the *Koran*;

(*ii*) the *Sunnas* or traditions handed down from generation to generation of the sayings and doings of the Prophet Mohammed;

(*iii*) *Ijma* or a rule of law arrived at by a consensus of opinion of Muslim jurists of any particular age; and

(*iv*) the *Kiyas* or analogical deductions made by the Judge from a comparison of the first three sources.

But while in the case of ancient Hindu law, the last two sources receded in the background except in different form, any textbook on Muslim Law has even now to start with these four sources.

Both the Hindu and Muslim legal systems claim a transcendental origin, and recognise the king only as a magisterial officer and not as a legislative head. The first source of law in both the cases is supposed to be a direct revelation, both the language and the sense being revealed.

The second source of both the systems is revealed so far as its sense is concerned, but the language in which it is expressed is of human origin.

Muslim law can make an additional claim of having as its founder one historical personage and each of its four sources as an emanation from the Almighty, being either directly or indirectly connected with the Apostle of God, the Prophet Mohammed. Again, while the Koran, the first source of Muslim law, contains a large number of direct injunctions on the temporal affairs of life, and is really and substantially the first and primary source of law, in the case of Hindus the *Shruti* is merely theoretically the first source of law. In the case of the Muslim law also, light of reason and good conscience were generally recognised as rules of guidance, and subsequently subsidiary sources giving scope to them were invented by the different schools of law (*vide* the principle of *Istihsan* of the *Hanafis*). This list of sources in the case of both the Hindus and the Muslims has to be expanded in view of the changed conditions on the

---

17. *Waghela Rajsanji* v. *Sk. Masludin*, 11 Bom 551 (PC).
18. D. Manek: *Handbook of Hindu Law*, 8th Edn., Chap. 1.

transfer of administration of law from the hands of native rulers and native judges to the British Government and British Judges and these additional sources are practically common to both the legal systems. These are:

(*i*) the Digests and Commentaries, principally the *Mitakshara* and the *Dayabhaga* in the case of Hindu law and the *Hedaya* and the *Fatwa-i-Alamgiri* in the case of Muslim law;

(*ii*) judicial decisions;

(*iii*) legislation; and

(*iv*) customs.

It may be noted that custom did not occupy a place of authority on law in the case of the original Muslim law except when a custom was covered by a tradition or *Ijmaa*. And to complete this examination of the two systems on the point of sources of law, we might mention that, according to later researchers, in the case of both the systems, ancient customs of the people, before the systems were promulgated and flourished, form the groundwork on which the systems are built up.[19]

4. Commentaries and Digests

After the *Smritis*, the next step in the development of Hindu law was the composition of a number of commentaries and digests based upon the *Smritis* or the *Dharmashastras* and *Sutras*. These various commentaries composed differed in their authorities in different districts. This gave rise to what are called "the schools of law". These schools operate in different parts of India.

The difference between the commentaries and the digests is that in commentaries we find an orderly explanation of the *Sutras* or *Shlokas* (सूत्रा: । श्लोका:) while the digests are compilations or assemblage of all the relevant material from several sources on any topic of law.

The main features of the commentaries can be summarised as under—

(*i*) The commentators have made the subject simple and easy to understand.

(*ii*) Quotations from various works are in profuse.

(*iii*) Topics of *Dharma* and of law are classified.

(*iv*) Customs and usages prevailing during their time are included.

As observed by the Supreme Court in *V.D. Dhanwantey* v. *CIT*,[20] "while interpreting ancient texts, the courts must give them a liberal construction to further the interests of the society. Our great commentators in the past bridged the gulf between law as enunciated in the Hindu law texts and advancing society by wisely interpreting the original texts in such a way as to bring them in harmony with the prevailing conditions. To an extent that function has now to be discharged by our superior courts."

---

19. M.D. Manek: *Handbook of Hindu Law*, 8th Edn., Chap. 1.
20. AIR 1968 SC 683, 696: (1968) 2 SCR 62: (1968) 68 ITR 365.

In theory Hindu law is ultimately based upon the *Vedas*. However, in matters of law the Vedas hold no greater authority than the *Smritis*. In modern practice the first place is occupied by the Commentaries and Digests, which are based upon *Smritis*.

The Commentaries interpret the law laid down in the *Smritis* and recite the customs and usages found in vogue around them. As expressed by the Privy Council[21] they do not enact the law but they explain and interpret the law and are evidence of the congeries of customs which form the law. Putting this idea in different words one may say that the Nibandhas or Commentaries while interpreting the *Smritis* modified the old law, recognising the demands of changing times. The main Commentaries are:

(*i*) *Dayabhaga* by Jimutavahana;

(*ii*) *Mitakshara* by Vijnaneshwara;

(*iii*) *Vir Mitrodaya* by Mitra Misra;

(*iv*) *Vivad Chintamani* by Vachaspati Mishra;

(*v*) *Vivad Ratnakara* by Chandeshwara;

(*vi*) *Dayatattva* by Raghunandana;

(*vii*) *Daya Krama Sangraha* by Sri Krishna;

(*viii*) *Smriti Chandrika* by Devananda Bhatt;

(*ix*) *Parasara Madhavya* by Madhavacharya; and

(*x*) *Vyavahara Mayuk* by Nilakantha.

Alongside the Commentaries grew Digest literature with a minimum of comment. Thus these together tried to reconcile the discrepancies in the sayings of the sages and consequently produced complete and consistent codes of rules on various departments of law.

Though the ultimate sources of Hindu law were *Shrutis* and *Smritis*, in course of time the Commentaries and Digests were viewed as authoritative expositions of Hindu law.

However, since the commentator put his own interpretation and his personal glaze and gloss on the text his authority in one part of the country was received and recognised but in another part of the country it was rejected. This gave rise to different schools with conflicting doctrines.[22]

As observed in *Moottoo Ramalinga case*[23], therefore, the duty of a judge who is under an obligation to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as is to ascertain whether it has been received by the particular school which governs

---

21. *Balwant Rao* v. *Baji Rao*, 48 Cal 30 (PC): 47 IA 213: AIR 1921 PC 59; *Anjubai* v. *Hemchandra Rao*, AIR 1960 MP 382; *Kesho Rao Bapu Rao* v. *Sadasheorao Dajiba*, ILR 1938 Nag 469: AIR 1938 Nag 167.
22. *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, (1868) 12 MIA 397 at p. 435.
23. *Ibid.*

the district with which he has to deal and has it been sanctioned by usage. The court in such cases is not to draw fresh conclusions from the original Hindu texts, but it is its duty to ascertain whether a particular doctrine of Hindu law has been received by the particular school of Hindu law prevailing in the district in which the case has arisen.[24]

Their authority.—It must be remembered that the commentators, while professing to interpret the law as laid down in the *Smritis*, introduced changes in order to bring the law in harmony with the usage followed by the people governed by the law; and that it is the opinion of the commentators which prevails in the provinces (now States) where their authority is recognised. . . . It is therefore clear, that in the event of a conflict between the ancient text-writers and the commentators, the opinion of the latter must be accepted.[25]

However it must draw our attention that the basis of digests and commentaries are authoritative sources and they contain the customs and usages observed in real life, meaning thereby that they are assemblage or confluence of the श्रुति, स्मृति and सदाचार — which are the sources of law.

Now difference of opinions exist among the digests and commentaries, one enjoys authority at one place and the other at some other place. This gave rise to schools of law.

In case of conflict between two commentaries or digests the later in time should prevail because the later commentary contains customs that are in vogue and the earlier describes customs that are given up.[26]

But as observed by the Privy Council in *Balwant Rao* v. *Baji Rao*[27], it must always be remembered that commentaries are only commentaries; they do not enact but explain and are evidence of customs prevailing at the time, which in order to be binding must be ancient, certain and reasonable; and must also not be immoral or opposed to decency or public policy. As observed by the Allahabad High Court in *Kasturi Devi* v. *Chiranji Lal*[28], a code enunciated by a *Smriti* writer (or law giver) has the force of law, a commentator could not arrogate to himself the status and functions of a law giver; his opinion, though of great value in the elucidation of the particular code, could not be permitted to override the law laid down by the *Smriti* itself. Thus *anuloma* marriage (i.e. marriage of males of higher caste with females of lower caste) were held to be valid by the ancient *Smriti* writers though they disapproved of them; but the commentators prohibited such marriages altogether as being unsuited to the

---

24. *Budhkaran Chaukhani* v. *Thakur Prasad Shah*, AIR 1942 Cal 311.
25. *Atmaram* v. *Bajirao*, 37 Bom LR 553 (PC).
26. *Muthukaruppa* v. *Sellathammal*, AIR 1915 Mad 475: ILR (1916) 39 Mad 298: 26 IC 785. This case is a glaring example of the above proposition.
    In "Modern Hindu Law" a question is posed for its answer. The question is in course of time we may find commentaries and digests written in Hindi, Telugu, Bengali and other regional languages. Will they also be acknowledged as sources of Hindu law? The question is debtatable but not hypothetical. Time would only tell it.
27. AIR 1921 PC 59: (1919-20) 47 IA 213: 48 Cal 30 (PC).
28. AIR 1960 All 446.

present *Kali* age. The Allahabad High Court in the said case[29] held that merely because such marriages had become obsolete and the commentators had prohibited them altogether, they could not be held illegal, for the prohibition was not found in law books (*Smritis*) and commentaries could not override them.

5. Judicial decisions

Judicial decisions are regarded as a source of Hindu law. During the British regime in this country Hindu law was administered by the British Judges with the help of Hindu Pandits. This continued till 1868 but this was not a happy position. The English Judges did not know Sanskrit and the Pandits interpreted the Sanskrit texts for them to apply it to the dispute and arrive at a decision. The situation was artificial and faulty since it gave scope for misinterpretation and the court itself was not confident of its own opinion.[30] However, the Judicial Committee and the High Courts in India have given judgments in such a large measure that all the important points of law can now be found in the law reports and to this extent it can be said that these decisions have supplemented the Commentaries. Strictly speaking legislation and judicial decisions are not sources but they have modified and supplemented pure Hindu law to such an extent that they have now emerged as important sources of Hindu law. As the commentators in the past bridged the gulf between law as enunciated in the text and the changing society, (so) the superior courts are now discharging the same function, though a delicate one.

Article 141 of the Constitution recognises the Supreme Court's role in this regard.

One must remember that the progress which Hindu law has made in the 19th and 20th centuries is entirely due to rulings of courts. And these decisions have often superseded the Commentaries. Succinctly, as almost all the points of Hindu law are to be found in law reports, the pride of place can be given to judicial decisions. Its importance is stressed by Bose, J. in a Nagpur Court decision[31], saying: "View it how you will, the laws we are administering are judge-made laws. The ancient sages said nothing about the present matter, and even when they spoke they often spoke with conflicting voices, and when they did not, sometimes spoke so enigmatically that the learned and the able commentators were unable to agree as to what they meant. In the circumstances, it is the courts which have moulded the Hindu law and made it what it is. . . ."

Duty of Courts[32].—As observed by the Privy Council in *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*[33] that the duty of a court, while

---

29. AIR 1960 All 446.
30. *Rungama* v. *Atchama*, (1846) 4 MIA 1.
31. *Udhao* v. *Bhaskar*, AIR 1946 Nag 203.
32. *Shri Krishna Singh* v. *Mathura Ahir*, (1981) 3 SCC 689: AIR 1980 SC 707; *Madauvali* v. *Babu Padmanna Tamadaddi*, AIR 1960 Mys 299.
33. (1868) 12 MIA 397, 436.

administering Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities or codes (*Smritis*), as to ascertain whether it has been received by the particular school or sub-school governing the locality with which it has to deal, and has it been sanctioned by usage; for, under the Hindu system of law, clear proof of usage will outweigh the written text of the law. Similarly the duty of a judge[34] is to ascertain the law as laid down by superior courts in India as well as by the Privy Council. It is well settled that the Hindu law as administered in this country is not the Shastric law, but what has been declared as law by courts of law.[35]

6. Legislation

Rules declared as law by a political sovereign in a society, group or state are called legislation. In a constitutional polity, the Constitution of the state is sovereign and an authorised group which makes and declares rules are known as legislation. Our present legal system is also based on this theory.

Legislation is the strongest source of law and it prevails over all other sources.[36]

As seen before, law and religion in India were conceived of as one and undivided.[37] Amendments during the British regime in India were first made with hesitation. It first abrogated practices which were not approved by the public and which were regarded as barbarous and inhuman, e.g. concremation, commiting of Sati, practice of Devadasi, practice of ostracising a person. These thus form an additional modern source of Hindu law. After coming into force of the Constitution of India, the State has guaranteed the freedom of conscience and religion, of course, subject inter alia, to the limitation that it can be exercised only subject to public order, health and morality and that it shall not prevent the State from making any law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.[38] The Constitution draws its strength from the people. The Constitution has consequently abolished discrimination on grounds of caste, creed, birth or sex, guaranteed equal protection under the law, forbidden the practice of untouchability and invalidated pre-Constitution legislation that was not consistent with the rights declared in Part III.[39]

Enactments modifying, abrogating and supplementing the Hindu law.— The important Acts of the Indian Legislature that have modified or supplemented Hindu law are the following:

(1) Caste Disabilities Removal Act, (also known as the Freedom of Religion Act), 1850. The Act provides that no right or property of a Hindu is forfeited,

---

34. *Madauvali* v. *Babu Padmanna Tamadaddi*, AIR 1960 Mys 299.
35. *Dudh Nath* v. *Sat Narain*, AIR 1966 All 315 (FB).
36. *Superintendence Co. of India* v. *Krishan Murgai*, (1981) 2 SCC 246, 257: AIR 1980 SC 1717; *Chand Narain* v. *Saroj*, AIR 1975 Raj 88; *Bai Dahi* v. *Bai Sada*, AIR 1961 Guj 105.
37. Rama Jois: *Seeds of Modern Public Law in Ancient Indian Jurisprudence*, (1990), Chap. 1, pp. 8 & 9.
38. Article 25, Constitution of India.
39. Articles 13 to 17.

nor is his right of inheritance in any way impaired, by reason of his or her renouncing, or being excluded from, the communion of any religion, or being deprived of caste.

(2) Hindu Widows' Remarriage Act, 1856, legalises the remarriage of widows and makes legitimate the issue of such marriages. (Repealed)

(3) Native Converts' Marriage Dissolution Act, 1866. The Act provides that a Hindu husband or wife when converted to Christianity can have the Hindu marriage dissolved, if the other spouse refuses to cohabit with such convert.

(4) Hindu Wills Act, 1870 (Repealed).

(5) Indian Contract Act, 1872. The Act supersedes the Hindu Law of Contract, except the rule of Damdupat which lays down that interest exceeding the amount of the principal cannot be recovered at any time.

(6) Indian Majority Act, 1875. The Act fixes the age of majority on the completion of the 18th year. It applies to Hindus except in matters of marriage, divorce and adoption.

(7) Transfer of Property Act, 1882 supersedes the whole of the Hindu Law of Transfer excepting certain matters referred to in Sections 2 and 129 (gifts) of the Act. But by the Amending Act XX of 1929 from the 1st of April, 1930, Chapter II of the Act has been applied to Hindus and the law of gifts of Hindus is also governed by the amended Act.

(8) Guardians and Wards Act (VIII of 1890).

(9) Anand Marriage Act, 1909.

(10) Hindu Transfers & Bequests Act, 1914 (Repealed).

(11) Hindu Disposition of Property Act, 1916.

(12) Hindu Transfer & Bequests (City of Madras) Act, 1921 (Repealed).

(13) Special Marriage (Amendment) Act, 1923. The Act permits a Hindu to contract a valid marriage with a person belonging to any caste or with a person professing the Jain, Sikh or Buddhist religion.

(14) Indian Succession Act, 1925. Sections 57, 58 and 214 provide rules regarding formalities of a valid will, etc. See also Schedule III.

(15) Hindu Inheritance (Removal of Disabilities) Act, 1928. The Act removes certain disabilities which excluded a Hindu from inheritance or a share on partition.

(16) Hindu Law of Inheritance (Amendment) Act, 1929. The Act makes certain changes in the order of succession in the Mitakshara law. (Repealed)

(17) Child Marriage Restraint Act, 1929.

(18) Hindu Gains of Learning Act, 1930. It secures to a member of a joint Hindu family his acquisition made substantially by means of learning, irrespective of the fact that he received his learning at the family expense.

(19) Hindu Women's Rights to Property Act, 1937. It gives new rights of inheritance to the widow and materially affects the Mitakshara Coparcenary. (Repealed)

(20) Arya Marriage Validation Act, 1937. The Act validates inter-marriages of a class of Hindus, known as Arya Samajists.

(21) Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946. The Act lays down the grounds on which a Hindu Married Woman is entitled to separate residence and maintenance. (Repealed)

(22) Hindu Marriage Disabilities Removal Act, 1946. The Act removes the disabilities in respect of marriages between persons belonging to the same Gotra or Pravara, or to different subdivisions of the same caste.

(23) Hindu Marriages Validity Act, 1949 which validates marriages between Hindus; though the parties to the marriage belong to different religions, castes, sub-castes or sects. (Repealed)

(24) Special Marriage Act, 1954.

(25) Hindu Marriage Act, 1955.

(26) Hindu Succession Act, 1956.

(27) Hindu Minority and Guardianship Act, 1956.

(28) Hindu Adoptions and Maintenance Act, 1956.

(29) Foreign Marriage Act, 1969.

This process of legislation is so to say a continuous one and several vital and dynamic amendments have been made by the four main Acts (Serial Nos. 24 to 27). In 1976, for the first time amongst the Hindus, the concept of divorce by mutual consent was introduced in the Hindu Marriage Act, 1955.

7. Custom or usage (Sadachar)

From the earliest period "achara" is considered to be the highest '*Dharma*'.[40] Consequently good custom (Sadachara or approved usage) and practices of good men (Shishtachara) were of great importance. Hindu law originated from customs and conventions. As time passed the original body of customs was defined and reshaped by great sages and the *Smritis* took the place of unrecorded customs. In the time of the Mahabharata custom was placed on a footing of equality with the *Shashtras*; so much so that where no prescription of the *Smritis* was available custom was a source of *Dharma*. Custom is still regarded as a source of law as expressed by the Supreme Court of India in *Amritlal Nagji case*[41].

If there is disagreement between the Smriti and custom, the Custom (Sadachar) has a upper hand because it is into practice. For example

---

40. *Manusmriti*, 1: 108-110.
41. *Amritlal Nagji* v. *Jayantilal*, AIR 1960 SC 964, 970.

Niyoga[42] (नियोग), though approved by the *Smritis*, yet it should not be practiced as people have rejected it with contempt.

(*a*) ***Definition***.—As defined by the Judicial Committee[43] custom signifies a rule which in a particular family or in a particular class or district has from long usage obtained the force of law.

(*b*) ***Essentials***.—It must be ancient, certain and reasonable. Custom must possess antiquity, continuity, certainty and reasonableness and it must not be immoral or opposed to public policy[44] or forbidden by statute. Custom being in derogation of general rules of law must be construed strictly.

Custom has to be established. The evidence produced must show the uniformity and continuity of usage over and above the convictions of those that follow it and believe that they are acting in accordance with law. The conviction must also emanate from some evidence. Long usage is the crux of the problem.

A custom is the twilight of law. It is not static. It keeps on changing with the changing times.[45] A custom is always a matter of fact and one custom cannot be deduced from the other. Custom is the actual usage and the actual usage makes the law but not its reasoning. Custom cannot be extended by analogy and it cannot be established by *a priori* methods.[46] It is enlarged by similarity of reasoning because it is the usage that makes the custom, not the reasoning of the thing.[47]

As decided by the Supreme Court a custom may be considered to be introduced into the law without its proof when it is frequently and repeatedly brought to the notice of the Court.[48]

No custom which is opposed to public policy can be recognised by any court of law.[49] Nor can immoral usages, however much practiced, be

---

42. Niyoga is a practice prevalent in ancient times which permitted a childless widow to have intercourse with the brother or any near Kinsman of her deceased husband to raise an issue to him, the son so born being called क्षेत्रज. (Vyasa) व्यास begot पांडु and धृतराष्ट्र on the widows of विचित्रवीर्य in this way (V.S. Apte: *Sanskrit English Dictionary*, 1963 Edn., p. 290. As per P. Ramanath Aiyar: *Advanced Law Lexicon*, 3rd Edn., (2005), p. 3200, "Niyoga" is the begetting of off spring by another on the wife of a man, who was either dead or impotent, or disordered in mind or incurably diseased. The son so begotten belonged to the husband of the woman. The Custom is now obsolete. The Smriti writers have declared it कलिवर्ज्य (prohibited in Kaliyug).
43. *Harprasad* v. *Sheo Dayal*, (1876) 3 IA 259; *Siromani* v. *Hemkumar*, AIR 1968 SC 1299.
44. *Vannie Kone* v. *Vannichi Ammal*, 51 Mad 1: AIR 1928 Mad 299; see also *Motiram* v. *Sukmabai*, AIR 1960 MP 46; *Balusami Reddiar* v. *Balkrishna Reddiar*, AIR 1957 Mad 97: ILR (1957) Mad 164; *Nannapaneni Venkata Subba Rao* v. *Thummala Bhujangayya*, (1960) 1 Andh WR 215: AIR 1960 AP 412; *Gokal Chand* v. *Parvin Kumari*, AIR 1952 SC 231 *referred to.*
45. *Sham Singh* v. *Ranjit Singh*, 1968 Cur LJ 930.
46. *T. Saraswathi Ammal* v. *Jagadambal*, AIR 1953 SC 201.
47. *Venkata Challamma* v. *Checkati*, AIR 1953 Mad 571.
48. *Munnalal* v. *Rajkumar*, AIR 1962 SC 1493.
49. *Balusami Reddiar* v. *Balkrishna Reddiar*, AIR 1957 Mad 97; *Nannapaneni Venkata Subba Rao* v. *Thummala Bhujangayya*, (1960) 1 Andh WR 215: AIR 1960 AP 412; *Gokal Chand* v. *Parvin Kumari*, AIR 1952 SC 231 *referred to.*

countenanced. A custom, which is abhorrent to decency or public morality, however long practiced and recognised by a particular community, can find no enforcement from a court of law. As to the test of immorality, it must be determined by the sense of the community as a whole and not by the sense of a section of the people.

Thus an alleged custom among the Reddiars of South India, according to which a man can marry his own daughter's daughter, cannot be recognized by a court of law, being opposed to public policy, abhorrent to decency and morality or inconsistent with the practices of good men. A few instances in a community microscopic in nature, cannot constitute a valid custom which a court of law will recognize and enforce.[50]

A custom cannot be extended by analogy or enlarged by parity of reasoning, and one custom cannot be deduced from another, and the Court has to find whether the specific custom set up has been established by clear and unambiguous evidence and whether the said custom has all the essential attributes to give it the force of law.[51]

As custom is "transcendent law" according to the sages, it is open to establish a custom modifying the ordinary Hindu law, i.e., a custom having the force of law. The essentials of a valid custom whether it is a caste custom or a sub-caste custom or custom of a particular locality or of a family, are that it must be ancient, certain, and reasonable and it cannot be enlarged beyond the usage by parity of reason, since it is the usage that makes the law and not the reason of the thing.[52]

The custom only comes in when it is in derogation of the Hindu law. If, therefore, any party relies on the Hindu law, he need not say that the custom is also in accordance with it, for in that case it is the law which will prevail.[53]

The burden of proving a custom in derogation of Hindu law is on the person who alleges it.[54]

A custom, in order to be binding, must derive its force from the fact that by long usage it has obtained the force of law; but the English rule that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary", should not be strictly applied to Indian conditions.[55] All that is necessary to prove is that the usage has been

---

50. *Balusami Reddiar* v. *Balakrishna Reddiar*, AIR 1957 Mad 97.
51. *Nannapaneni Venkata Subba Rao* v. *Thummala Bhiyangayya*, (1960) 1 Andh WR 215: AIR 1960 AP 412. See *Commr. Hindu Religions and Charitable Endowments (Admn.)* v. *Vedantha Sthapna Sabha*, (2004) 6 SCC 497, para 24.
52. *Deivanai Achi* v. *Chidambaram Chettiar*, (1955) 1 MLJ 120: 67 Mad LW 965: AIR 1954 Mad 657; *Venna-Muddala Venkatachallamma* v. *Cheekati*, ILR (1953) Mad 741: AIR 1953 Mad 571.
53. *Amar Chand* v. *Mst. Shankri*, 1953 Raj LW 138.
54. *Sahdeo Narayan Deo* v. *Kusum Kumari*, AIR 1923 PC 21; *Chandika Baksh* v. *Munna Kaur*, 29 IA 70: 1924 All 273; *Nanu* v. *Nani*, AIR 1957 Tra Co 289.
55. *Gokal Chand* v. *Parvin Kumari*, AIR 1952 SC 231; *Mt. Subhani* v. *Nawab*, AIR 1941 PC 32 *relied on.*

acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality.[46]

Every custom is supposed to be based on a lost text of the revelations. This emphasises its obligatory character. It is therefore rightly remarked by the Privy Council that "clear proof of usage will outweigh the written text of the law".[56]

In short, a custom must be ancient, invariable and continuous,[57] clear and unambiguous[58], reasonable[59], not opposed to public policy or law or morality and must be obligatory.[60]

(c) ***Onus of proof and discontinuance of a custom.***—For the existence of a custom, judicial recognition is not necessary but recognition is definitely an evidence of its existence. It is important to understand that where a custom is recognised by court in a number of cases the custom enters the field of Common Law of the land. One who affirms and asserts it has not to prove it[61] but one who denies it, has to disprove its existence.[62]

The burden of proof of a custom derogatory to a particular law is upon the person who asserts it. The custom has to be clearly pleaded and satisfactory evidence for it has to be placed before the court. The evidence placed must prove the uniformity and continuity of the usage and the conviction of its followers that they were acting in accordance with law. This conviction must be inferred from the evidence. As expressed by the Chennai High Court[63] evidence of the act of the kind, acquiescence in those acts, the statement of experienced and competent persons of their belief that such acts were legal and valid, will all be admissible, but it is obvious that, although admissible, evidence of the latter kind will be of little weight, if unsupported by actual examples of the usage asserted. However, this view stands modified to a certain extent by Privy Council judgments.[64] Consequently a custom may be proved either by actual instances, or by general evidence of the members of the tribe or family, who would naturally be cognizant of its existence; specific instances need not always be proved. A custom or usage repeatedly brought to the notice of the Courts, may be held to be introduced into the law without necessity of proof in each

---

56. *Ramanand Lal* v. *Damodar Das*, 1942 ALJ 94: AIR 1942 All 100; *see* also *Collector of Madura* v. *Mootoo Ramalinga Sathupathy*, (1868) 12 MIA 397.
57. *D.C. Bara Banki* v. *Receiver of the Estate of Choudhry*, AIR 1928 PC 202: 55 IA 303.
58. *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*, (1871-72) 14 MIA 570: IA Supp 1.
59. *Anandi Devi* v. *Rajaram*, AIR 1973 Raj 94: 1972 Raj LW 527.
60. *Ramalaxmi* v. *Sivanantha*, 14 MIA 570; *Vaniakone (Mokkakone)* v. *Vannichi Ammal*, 51 Mad 1; *Rabindra* v. *State*, AIR 1969 Cal 55.
61. *Kondiba Rama Papal* v. *Narayan Kondiba Papal*, (1991) 2 SCC 218.
62. *Janardhana* v. *Kaliamma*, AIR 1968 Mad 105: ILR (1968) 1 Mad 548.
63. 7 Mad HC 250.
64. *Ahmad Khan* v. *Mt. Channi Bibi*, 6 Lah 502 PC; *Gopi Krishna Kasaudhan* v. *Mst. Jaggo*, 58 All 397 (PC); *Madhavrao Raghavendra* v. *Raghavendra Rao*, 48 Bom LR 196.

particular case.[65] The court then takes judicial notice of it. The Supreme Court has always favoured the view of the Privy Council; it has upheld a rule of interpretation of the Shastras that "if there is a clear usage to the contrary the Shastras have to yield;"[66] and in case of conflict between the *Smritis*, a judge should consult the prevailing practice among the people and decide a case.[67]

(*d*) *Custom and Usage*.—A custom is different from usage. In case of usage the elements of antiquity, continuity and notoriety as a condition precedent in recognition of its validity need not be proved to exist. However usage must be well known and followed by parties in their transactions. Usage is therefore uniform customary practice.

(*e*) *Types of Customs*.—There are four types of customs:

(*i*) family customs;

(*ii*) class customs;

(*iii*) local customs; and

(*iv*) Institutional customs.

Family custom is confined to a definite family while class custom depicts the custom of a caste or a sect or of a particular profession or occupation. Local custom is confined to some particular or definite State, country, district or locality. It is binding on all the inhabitants of that locality, district or State.

In so far as continuity is concerned there is a distinction between a family custom and a local custom. In the case of the former it is competent to the family to discontinue the custom, e.g. a family custom that property should remain impartible, is destroyed by the family subsequently treating it as if it is partible. But in the case of a *local custom*, the omission of individuals to follow the custom cannot have the effect of destroying it, as it is a part of the law of the land and binds all the persons within the local limits of which it prevails.[68] The burden of proving the discontinuance of a custom, after its existence has been proved, lies upon him who alleges its discontinuance.

Customs of Muths and religions and charitable endowments — about the succession to the office of Mahant (महन्त), Shebait, (सेवायत) and Dharmakarta (धर्मकर्ता) are notable among Institutional Customs.

The "Gurwat" custom prevailing among the Agarwal community of the Chhatisgarh region of the State of Madhya Pradesh[69] and custom of Illatom adoption, i.e., adoption of a son-in-law, prevailing among the Reddi and Kamma

---

65. *Hemendranath Ray Chaudhuri* v. *Jnanendraprasanna Bhaduri*, 63 Cal 155; *Krishnamurthi Ayyar* v. *Krishnamurthi Ayyar*, 50 Mad 508 (PC); *Banarsi Das* v. *Sumat Prasad*, 58 All 1019.
66. *Shyam Sunder Prasad Singh* v. *State of Bihar*, 1980 Supp SCC 720: AIR 1981 SC 178.
67. *Ibid.* शास्त्रात् रूढि गरीयसी। and स्मृत्योर्विरोधे न्यायस्तु बलवान व्यवहारनः।
Yaj., II: 21. [For examples see also HMA, S. 3(*a*); HSA, S. 3(*d*); HAMA, S. 3(*a*)].
68. *Rajkishan* v. *Ramjoy*, ILR (1876) 1 Cal 186, 196 (PC).
69. *Sanat Kumar Agarwal* v. *Nandini Agarwal*, (1990) 1 SCC 475: AIR 1990 SC 594: 1990 ALR 182.

castes in territories falling under the erstwhile Chennai Presidency[70] are instances of a caste or community custom.

As held by the Supreme Court of India in *Sant Ram* v. *Labh Singh*[71], custom is affected by Part III of the Constitution and customs and usages having in the territory of India the force of law must be held to be within the expression "all laws in force" in Article 13.

(f) Judicial notice of a custom.—If a custom is so clearly established that no further evidence of its existence is necessary, a court takes judicial notice of it thereof. Such custom will form a part of law without any further proof.

8. Equity, Justice and Good Conscience

Equity, justice and good conscience can also be regarded as one of the sources of Hindu law. Origin of equity and equitable interpretation can be traced to the Hindu period when jurists explained the old laws and gave new interpretations for equitable solutions.

In the event of conflict between the *Smritis* or in the absence of any specific law as to a point (in the *Smritis*) the principles of justice, equity and good conscience would be applied, i.e., what is fair and equitable in a particular case would be done by a judge. This phrase is generally interpreted to mean rules of English law on the analogous matter as modified to suit Indian conditions and circumstances.[72] As observed, there is an area of Hindu law where these rules of English law have been grafted on rules of Hindu law. This has been done in cases where the Hindu law rules have been found to be wanting or where the rules are rigorous. And this is what is said by the Supreme Court in *Gurunath* v. *Kamlabai*[73].

As held in *Kenchava* v. *Girimalappa Chinappa*[74], (before the passing of the Hindu Succession Act, 1956) by the Privy Council the murderer was disqualified from succeeding to the property of the victim. The rule of English law was thus applied to a Hindu on grounds of justice, equity and good conscience. And this is statutorily recognised in the Hindu Succession Act, 1956.

9. Text Books

Text books, though written by erudite scholars and though material in them on Hindu law has been culled from all sources are useful but they are not a source of Hindu law. They narrate and discuss rules of Hindu law but they do not possess any authority or constitutional competence to make law.

---

70. *G. Narayanappa* v. *Govt. of A.P.*, (1992) 1 SCC 197: AIR 1992 SC 135.
71. AIR 1965 SC 314.
72. *Waghela Rajsanji* v. *Sheikh Masludin*, (1887) 14 IA 89.
73. AIR 1955 SC 206.
74. (1923-24) 51 IA 368.

It should be noted that even members of our Higher judiciary decide cases by quoting extracts from text books, as though they are rules of Hindu law. They do not take pains to look into the references, analyse and discuss and then apply the law to the case in hand. We cannot overlook this mistake by calling it a mistake of a procedural nature; it is indeed a mistake as to the substantive law, because text books are not a source of law and what is quoted from them is not the law and thus cannot be a basis for deciding a dispute. For example, Mulla's Hindu law. It is not a source of Hindu law and yet the Courts have formed a habit of citing it as though D.F. Mulla were a Hindu Smriti writer or a टीका or निबंध writer who laid down law for the Hindu society which has been accepted as binding by the Hindus, or as if it were a code of Hindu law passed by a competent legislature.[75]

B. SCHOOLS OF HINDU LAW

Due to lack of uniform interpretation of Hindu scriptures by Hindu scholars divergent opinions emerged and this gave rise to two schools of Hindu law. This divergence was named by Colebrook as schools of Hindu law. In fact Hindu jurists themselves did not think of such theories or doctrines dividing Hindu law into various schools of thought. European writers labelled these differences as representing specific schools. The term "schools" has now gained currency. In this regard the Privy Council[76] has said that the remoter sources of Hindu law (i.e. the *Smritis*) are common to all the different schools. The process by which these schools have been developed seems to have been of this kind: works universally or very generally received became the subject of subsequent commentaries. The commentator put his own gloss on the ancient text, and his authority having been received in one and rejected in another part of India, schools with conflicting doctrines arose. One has to remember, however, that commentaries are commentaries; they do not enact; they explain and are evidence of the congeries of customs which form the law.[77]

Strictly viewed there are only two schools of Hindu law: (1) The Mitakshara (meaning "a concise work") school of law, and (2) The Dayabhaga school or Bengal school of law. From the fundamental doctrinal point of view these schools are different. A school denotes the diversity of a doctrine which is a result of some different train of reasoning and interpretation.

The Mitakshara school of law is followed throughout the whole of India except Bengal. In Bengal the Dayabhaga school of law is followed. The

---

75. *See* Supreme Court's unanimous judgment in *Bishundeo Narain* v. *Seogeni Rai*, AIR 1951 SC 280, 283: 1951 SCR 548 (quoted in Modern Hindu Law). The same is the case with Mayne and Raghavachariar also in varying degrees. Their opinions may be considered if they are consistent with the principles of justice, equity and good conscience and it may be accepted or applied only when there is absence of a rule in other sources of law. Besides the judges have to reason out as to how that opinion is in harmony with the principles of justice, equity, and good conscience. That the opinion is of a great writer does not by itself establish this harmony: See *Jethabhai* v. *Manabai*, AIR 1975 Bom 88: 1975 HLR 449, 467 (Bom): 76 Bom LR 304. (Modern Hindu Law, pp. 581-59).
76. *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, (1868) 12 MIA 397, 435.
77. *Jawahar Lal* v. *Jaran Lal*, 46 All 192.

Mitakshara school of law has some sub-schools, namely the Mithila, the Benares, the Maharashtra (Mumbai) and the Dravida (Chennai) sub-schools. These sub-schools do not differ on any fundamental principles, except on certain details.

Mitakshara is a commentary on the Yajnavalkya Smriti. In truth it is more a digest than anything. Vijnaneshvara is its author. For over nine centuries it has held a remarkable position in legal literature. Dayabhaga is a digest of all *Smritis*. It came later than Mitakshara and displays original thinking on many matters. It is of supreme authority in Bengal. But even in Bengal, the Mitakshara is regarded as a high authority on all questions in respect of which there is no express conflict between it and the Dayabhaga and other works prevailing there, viz. the *Dayatattwa* and the *Daya Krama Sangraha*. Similarly the *Dayabhaga* may also be referred to in a *Mitakshara* case on points on which the *Mitakshara* is silent.[78]

Dayabhaga was written by Jimutavahan who lived sometime between the 13th and the 15th centuries.

The geographical limits of these schools cannot be clearly defined. However one may say that:

(*a*) The Benares school prevails in North Bihar, Benares, Central and Western India and the whole of Northern India. In Punjab it is considerably modified by customs. The *lex loci* of the Central Provinces (now Madhya Pradesh) is the Benares school of Hindu law.[79]

(*b*) The Mithila school prevails in what was in ancient times the province of Mithila or Tirhoot and in the adjoining districts, now within the jurisdiction of the Patna High Court. The traditional boundaries of Mithila are in the North — the Nepal border, on the South — the Ganges, on the East — the river Koshi, and on the West — the river Gandak.[80]

(*c*) The Dravida or Chennai school prevails in the Chennai State, i.e. Southern India.

(*d*) The Maharashtra or Mumbai school prevails in Gujarat, Kanara, and the parts where the Marathi language is spoken as the local language.

The four sub-schools of the *Mitakshara* School have been given above. The works which supplement the *Mitakshara* in each may be laid down as under:

(1) *The Benares school*: *Viramitrodaya, Nirnaya Sindhu, Mitakshara and Dattaka Mimansa*

---

78. *Buddha Singh* v. *Lalta Singh*, 37 All 604: 47 All 427.
79. *Raja Chattar Singh* v. *Diwan Roshan Singh*, AIR 1946 Nag 277; also see *Vimla Bai* v. *Hiralal Gupta*, (1990) 2 SCC 22, 27-30.
80. *Chandra Choor Deo* v. *Bibhuti Bhushan Deva*, AIR 1945 Pat 211.

(2)	*The Mithila school:*	*Vivad Chintamani, Mitakshara Vivad Ratnakara, and Dattaka Mimansa*
(3)	*The Dravida or Chennai school:*	*Smriti Chandrika, Mitakshara, Parasar Madhava, Saraswati Vilas, Viramitrodaya, Vyavahar Nirnaya, Nirnaya Smriti Chandrika & Dattaka Chandrika*
(4)	*The Mumbai or Maharashtra school:*	*Vyavahara Mayukh, Mitakshara, Sanskara Kaustubha, Viramitrodaya, Dattak Mimansa and Nirnaya Sindhu*

Authority of the Works.—(1) In Western India, the Vyavahara Mayukh of Nilakanth Bhatt is of paramount authority in Gujarat, the North Konkan and Mumbai.

(2) In Maratha country, Northern Kanara and the Ratnagiri district the authority of the Mayukh is inferior to that of the Mitakshara. Mayukh however is of high authority throughout western India. Wherever the Mitakshara is silent or obscure its aid would be invoked. As observed by the Mumbai High Court the well-established principle is to construe the two works so as to harmonise them with each other in so far as it is reasonably possible.[81]

(3) As observed by the Privy Council, the usual law as to the Hindus in the province of Berar (now part of the State of M.P.) is the same as the Hindu Law in the province (now State) of Mumbai.[82] As regards authority the Mitakshara is paramount and the Mayukha is of secondary consideration, being only relied upon where the Mitakshara is silent or doubtful.[83]

Note.—(*i*) The geographical area mentioned against the schools cannot be precisely indicated, it is just to give an approximate idea. Therefore one has to prove in each case which sub-school applies. (*ii*) The works (books) mentioned are a common property and in cases of disagreement the application is localised. (*iii*) Only the Mumbai or Maharashtra sub-school has its distinct identity on subjects of Succession and Stridhana.

---

81. *Bhagwan Vithoba* v. *Warubai Kom Baburao Mudke*, 32 Bom 300.
82. *Harigir* v. *Bharathi*, AIR 1925 PC 127.
83. *Mahabir Prasad* v. *Rai Bahadur Singh*, 18 Luck 585: 203 IC 244: AIR 1942 Oudh 27.

C. DIFFERENCES BETWEEN THE MITAKSHARA AND THE DAYABHAGA SCHOOLS

These two schools of law differ[84] in two main matters:

(*i*) in some matters connected with the joint family system, and

(*ii*) in the rules of inheritance.

So far as the Mitakshara system is concerned, right in family property is acquired *by birth*. In this system a family is a unit and individual rights are not recognised. As a rule, females have no rights of succession to family property. The rights to property pass to the male members by survivorship.

Under the Dayabhaga system rights in joint family property are acquired *by inheritance* or *by will*. The share of a deceased coparcener goes to his widow where there is no nearer heir.

By reason of this difference the power to alienate an undivided share in the joint family property differs in these two schools. In matters relating to inheritance, the Mitakshara system considers the principle of nearness of blood as the deciding point and bases the right of inheritance on this principle preferring agnates to cognates generally. The Dayabhaga system bases the right to inherit upon the principle of the amount of spiritual benefit, which the person claiming can confer by an offering to the names of the deceased.

The main points of difference may be laid down as under:

(1) *Ownership of property.*—The Mitakshara expounds the doctrine of *ownership by birth* in favour of the son in ancestral property held by his father, making the son a co-owner with his father. This is called जन्मस्वत्ववाद. The property is therefore known as (अप्रतिबंधदाय) unobstructed property. The son, in such a case, is entitled to demand partition of such property even during his father's lifetime.[85]

In the case of the Dayabhaga school, it does not approve of this doctrine. The son, while his father is alive, cannot demand partition. This is called उपरमस्वत्ववाद. That is why the ancestral property is obstructed property (called सप्रतिबंधदाय property).

(2) *Right of son.*—The next difference follows from the first and that is, in the Mitakshara school, a son has a right to control and interdict unauthorised alienations of ancestral property by his father; under the Dayabhaga school the father is the absolute owner of the property and the son has no such right.

(3) *Alienation.*—Under the former, a member of a joint family cannot alienate his interest in it, while, under the latter, on the father's death his sons

---

84. *See* Mayne's *Hindu Law*, 10th Edn., p. 59.

85. Under Hindu law 'son' means and includes son, son's son and son's son's son i.e. the male child upto the 4th degree in the male line (father being the 1st degree). This is because they equally confer great spiritual benefit — Manu, IX: 137; Vas, 17:5; Vishnu, 15, 46 & 186; Yaj., 1: 78. However the meaning of "father" is not technical extending beyond the real father.

obtain the father's property in quasi-severalty as a partitioned succession; and each son is entitled to alienate his share freely.

(4) *Right of survivorship.*—Under the former there is a right of survivorship *inter se* between members; under the latter on the death of a member in the absence of a male issue his share devolves on his widow by inheritance.

(5) *Basis of heritability.*—Under the Mitakshara school of law the principle of blood relationship is the basis of heritability and propinquity and it is the rule for determining preference. Spiritual benefit is the basis of heritability under the Dayabhaga school and it determines the order of succession.[86]

The commentators of *Smritis* displayed practicality and pragmatism in weeding out certain practices as obsolete as they thought that *Dharma* followed in each Yuga or age was variable. For example, the institution of Niyoga (vicarious progeniture of a son to a sonless person) is discarded. Similarly what is abhorred by the world should not be practiced was the precept of Yajnavalkya himself. This has kept the *Smriti* law abreast of all times.

The various law sub-schools have their special commentaries and they are considered to be authoritative there. These sub-schools are the Mithila school, Benares law school, Maharashtra law school, Gujarat law school, Chennai (or Dravida) sub-school, the Punjab law school and the Bengal law school.

D. EFFECT OF LEGISLATION

A far reaching modification in the differences of Schools has been effected by modern legislation. Laws of Succession and adoption have brought uniformity in that area on a very large scale. For example—

(*i*) The Hindu Succession Act, 1956 dispenses with the concept of 'Sapinda'.[87]

(*ii*) The list of heirs given by HSA applies to all Hindus regardless of their schools.

(*iii*) The rule of survivorship of the मिताक्षर school was pruned to an insignificant remnant in practice.

(*iv*) The proprietary rights of a Hindu female and the rules of succession to her have been made uniform.

(*v*) After enacting the 1956 HSA, the Parliament in 2005 passed the Hindu Succession (Amendment) Act which

(*a*) conferred right by birth on the daughter of a coparcener in the मिताक्षर school in his coparcenary property, and

---

86. Which school is more progressive — दायभाग or मिताक्षर?
The answer would depend upon the unanimous objective criterion of what is progressive. The question is debatable.

87. The दायभाग and मिताक्षर defined this concept differently and propounded different principles and rules for settling the order of heirs to a deceased.

(*b*) abolished the rule of survivorship.

Note.—Before this central legislation the process of conferring right by birth had already started in the states — i.e. in Andhra Pradesh (in 1986), in Tamil Nadu (in 1989), in Maharashtra (in 1994) and in Karnataka (in 1994). These states enriched the daughter of a मिताक्षर coparcener.

Consequently the division of Schools in Hindu Law has been rendered a matter of history to a large extent.[88]

E. PERSONS GOVERNED BY HINDU LAW

To a question of much practical importance as to who are governed by Hindu law the readiest answer which one would be tempted to give is, that the Hindus are the persons who are governed by Hindu law. This is of course in accordance with the provisions of the enactments authorising and regulating the application of Hindu law but this gives rise to another equally important question as to who are Hindus? (For answer to this question see Chapter I under the caption "Hindu and Hindu Religion".)

Prior to 1955-56 the Hindu law applied to Hindus by birth and also to Hindus by religion. Consequently converts to Hinduism from different faiths were also brought within the ambit of Hindu law. For persons converted from Hinduism to other faiths and thereafter relapsing to Hinduism it was for them to show that they were now Hindus.[89] As held by the Privy Council in *Bhagwan Koer case*[90] lapses from orthodoxy would not put a person outside the pale of Hindu law. One who did not believe in Hindu scriptures, its rituals or even in some dogmas and even the dissenters from Hinduism like Sikhs, Buddhists and Jains, Arya Samajists and Brahmo Samajists, etc., are nevertheless Hindus. Illegitimacy did not bar the application of Hindu law provided the illegitimate child was brought up as a Hindu.[91]

The Hindu Marriage Act, 1955 defines a Hindu in Section 2. Accordingly, a Hindu is one who is not a Muslim, Parsi, Christian or Jew. The term Hindu denotes all those persons who profess the Hindu religion either by birth from Hindu parents or by conversion to Hindu faith. As per ancient Hindu rules a Hindu is born and cannot be made, but as pronounced by the court in *Morarji case*[92] a Hindu can be made by conversion to Hinduism.

Thus a Hindu is a person who follows the Hindu religion in any of its forms and developments including a follower of the Brahmo Samaj, Prarthana Samaj, Arya Samaj or a Virashaiva or Lingayat. Children of Hindu parents are also Hindus. Even the converts or reconverts to the Hindu religion are Hindus.

---

88. But the State legislatures of some states have made various amendments to the Union Acts. They are no doubt competent to do so but by such legislation may give rise to new schools and sub-schools.
89. *Rajagopal* v. *Armugam*, AIR 1969 SC 101.
90. *Bhagwan Koer* v. *Bose*, ILR (1904) 31 Cal 11 (PC).
91. *Mynabaee* v. *Ootaram*, (1861) 8 MIA 400.
92. *Morarji* v. *Administrator-General of Chennai*, (1929) 52 Mad 1960: 11 IC 364, *see* also *V.V. Giri* v. *D. Suri Dora*, AIR 1959 SC 1318.

As explained by Manu, caste in Hinduism is not dependent upon birth but upon actions, and a Shudra may, by his actions, raise himself to the position of a Vaishya, Brahmana or Kshatriya. However, this has been forgotten by courts and the evil of recognising caste on the ground of birth alone has been deep-rooted in Hindu society, since it gave up the study of the *Vedas* and old Shastras.

F. MIGRATION AND ITS EFFECT

A Hindu family[93] residing in India is presumed to be governed by the Hindu law prevalent in that place. When a Hindu family leaves one district and goes to another district that does not affect its personal law. However, if it is shown that the family by such transfer intended to change its personal law and has in fact so changed it, the presumption would not be applied.[94]

In matters of personal relations and status there is no *lex loci* in India. Consequently every person is governed by the law of his personal status. This is so because the existence of a *lex loci* is inconsistent with the existence of personal communal law. A Hindu family migrating from one part of India to another carries with it the law of the place of its origin. Of course this presumption is rebuttable on production of proof.[95] Similarly when a family migrating from India to a foreign country settles there and acts in a manner denoting that it has cut itself off from its old environment, a presumption arises that it has adopted the laws of the people among whom it has settled.

Thus it is the law existing at the time of migration which continues to govern the migrated members until it is renounced. Strong proof is required for establishing that the party has given up the law of origin in favour of a different system of law.[96]

Khojas and Kutchi Memons of Kutch and Kathiawad on migration to Chennai and other parts of India retained the (Mitakshara) rules of Hindu law in general not only in matters of succession and inheritance but also with regard to their property including the Hindu concept of coparcenary and survivorship.

G. CODIFICATION

Codification is a process of incorporating the law on a particular topic or subject in statutes. It has its advantages as well as disadvantages. Bentham was in favour of codification while Savigny was opposed to it.

The first step to codify Hindu law was taken in 1941 by forming a committee for the purpose and inviting its suggestions. The committee ceased to function but was revived in 1944. Its President was Sir B.N. Rau. The object of

---

93. *Shantabai B. Kalbhor* v. *Ramchandra K. Karhale*, AIR 1960 Bom 408.
94. *Soma Shekhara* v. *Mahadeo*, ILR (1930) 53 Mad 297, *affirmed* in *Soma Shekhara* v. *Mahadeo*, AIR 1936 PC 18 on appeal.
95. *Hirabai* v. *Bhagirathibai*, AIR 1969 MP 241, following *Anjubai* v. *Hemchandra Rao*, AIR 1960 MP 382; *Bijoy Lal Pandey* v. *Bhubaneshwar Pandey*, AIR 1963 Cal 18; *Abdurahim* v. *Halimabai*, 43 IA 35: AIR 1915 PC 86.
96. *Sonabai* v. *Laxmibai*, ILR 1956 Nag 580; *Ramdayal R.* v. *Ch[illegible]bhujlal R.*, ILR 1956 Nag 607.

the Committee was to evolve a uniform Code of Hindu law and it submitted its report in the form of a Code. The report was split up in separate Bills and then passed into four Acts. These Acts have substantially unified Hindu law.

In this connection it would be fruitful to note what S.M. Bhattacharjee, C.J. of the Mumbai High Court expressed in his book on "Hindu Law and the Constitution".

In enacting Article 44 of the Constitution we amply demonstrated our conviction that the religion-oriented personal laws of ours were all outmoded and outdated and require to be replaced by a set of general and territorial laws contained in a uniform civil code. There is a struggle going on between Part III and Part IV of the Constitution (i.e. between Executive-cum-Legislature on the one hand and the Judiciary on the other) as if the former is attempting to protect Part IV while the latter is attempting to protect Part III. This was set at naught in *Minerva Mills Ltd. case*[1] by the Supreme Court of India, declaring that these two are like two wheels of a chariot and one is no less important than the other. However "to destroy the guarantee given by Part III in order purportedly to achieve the goals of Part IV is plainly to subvert the Constitution by destroying its basic structure". Non-implementation of these provisions would obviously amount to a breach of trust with which we have entrusted ourselves by our Constitution. During all these years after Independence we have been able to codify only the laws of the Hindus and, that too, a small portion of it. And this was because the drafts thereof were readily available. It was for this passivity and indolence of the government that the Supreme Court in 1985 in *Mohd. Ahmed Khan* v. *Shah Bano Begum*[2] expressed that "Article 44 of our Constitution has remained a dead letter" and that "a beginning has to be made if the Constitution is to have any meaning". This concern was reiterated by the Supreme Court again in *Jorden Diengdeh* v. *S.S. Chopra*[3] and *Sarla Mudgal case*[4].

These four Acts constitute the law in a coded form for Hindus and are to be read in conjunction with one another. Unless the context contra-indicates, definitions of words may be lifted from any of these Acts in order to interpret the provisions of any of the other Acts.[5]

H. THE DOCTRINE OF FACTUM VALET

The doctrine declares that *a fact cannot be altered by a hundred texts*. If a fact is accomplished or an act is done the fact will nevertheless stand and the act done will be deemed to be legal and binding. This doctrine was originally enunciated by the author of the Dayabhaga school and was recognised by the followers of the Mitakshara school.

---

1. *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625: AIR 1980 SC 1789, 1806, 1807.
2. (1985) 2 SCC 556: 1985 SCC (Cri) 245: AIR 1985 SC 945.
3. (1985) 3 SCC 62: AIR 1985 SC 935, 940, 941.
4. *Sarla Mudgal* v. *Union of India*, (1995) 3 SCC 635: 1995 SCC (Cri) 569: AIR 1995 SC 1531: (1995) 2 KLT 45: (1995) 2 An LT (Cri) 50: 1995 Cri LJ 2926.
5. *Padmaja Sharma* v. *Ratan Lal Sharma*, (2000) 4 SCC 266: AIR 2000 SC 1398.

Texts are of two types: directory and mandatory. The doctrine applies only to directory texts and not to mandatory texts. That is, if an act is done in contravention of a mandatory text, the application of the doctrine cannot cure it. For example non-observance of essential ceremonies during a marriage cannot be cured by application of this doctrine.[6]

The corresponding maxim in Roman civil law for this is *factum valet quod fieri non debuit,* i.e. what ought not to be done becomes valid when done. This doctrine was applied by British courts in India.

---

6. *Dervanai* v. *Childombaram,* AIR 1954 Mad 657; see also *Lakshmappa* v. *Ramayya,* (1875) 12 Bom HC 364; *Srimati Uma Devi* v. *Gokoolanund Das Mahapatra,* (1878) 3 Cal 587: (1877-78) 5 IA 40.

Chapter III

Joint Family

SYNOPSIS

A. Mitakshara law
   1. Nature
   2. Composition
      (*a*) Its members
      (*b*) Enjoyment of property and Karta
   3. Essential features
   4. Hindu coparcenary
      (*a*) Formation of a coparcenary
      (*b*) Features of a joint family
      (*c*) Essentials of a coparcenary
      (*d*) *Moro Vishvanath* v. *Ganesh Vithal*
      (*e*) Coparcenary within coparcenary
   5. Notable features of a Hindu coparcenary
      (*a*) A creature of law
      (*b*) No female member
      (*c*) End of coparcenary
      (*d*) Unity of possession and ownership
      (*e*) Mode of succession
      (*f*) Unity of juristic existence
      (*g*) Incidents
      (*h*) Coparcenary rights to women in property and death of the Hindu joint family
   6. Joint tenancy of English law and Hindu coparcenary: Difference
   7. Coparcenary property
      Property included in joint family property
   8. Presumptions as regard coparcenary and coparcenary property
      (*a*) Jointness in food, worship and estate
      (*b*) Continual jointness
      (*c*) Partition
      (*d*) Possession of property
      (*e*) Nucleus of joint family
      (*f*) Acquisition of separate property by a member
   9. Distinction between obstructed (सप्रतिबंधदाय) and unobstructed (अप्रतिबंधदाय) heritage
   10. Property: Classification of
   11. Joint family property: Divisions
      (*a*) Ancestral property
      (*b*) Property acquired by all with aid of joint family funds
      (*c*) Property acquired by joint labour
      (*d*) Separate property thrown into common stock
      (*e*) Accretions to joint family property
   12. Incidents of joint property and separate property
      (*a*) Devolution
      (*b*) Nature of interest
      (*c*) Acquisition of interest
      (*d*) Alienation by Will
      (*e*) Alienation by gift
      (*f*) Alienation by sale or mortgage
      (*g*) Partition
      (*h*) Summary in a tabular form
   13. Ancestral property
      (*a*) Meaning
      (*b*) Classification
      (*c*) Father's and son's interest in ancestral property: Nature of
      (*d*) Father's special power of disposition
   14. Separate property
      (*a*) How acquired
      (*b*) Incidents of separate property
      (*c*) Gains of learning
   15. Ancestral business
   16. Difference between an ordinary partnership and a Hindu joint family firm
      (*a*) Creation and nature
      (*b*) Acquisition of interest
      (*c*) Death
      (*d*) Dissolution by notice
      (*e*) Liability to render accounts
      (*f*) Share in the business
      (*g*) Power to incur debts
      (*h*) Extent of liability
      (*i*) Right of survivorship
      (*j*) Suit in the name of the firm

IOL Acc No — 111865 मस्टिस्टर 20|20|22

(*k*) Partnership with strangers
(*l*) Business by the manager: Whether new or old
(*m*) Essence of decided cases

17. Rights of Coparceners
(*a*) Community of interest and unity of possession
(*b*) Joint possession and enjoyment
(*c*) Right to enforce partition
(*d*) Right of survivorship
(*e*) Right to manage
(*f*) Right to renounce
(*g*) Right of alienation
(*h*) Right to account
(*i*) Right to make self-acquisitions
(*j*) Right to set aside alienations
(*k*) Right to restrain unauthorised acts
(*l*) Right to share of income and savings
(*m*) Right to maintenance and necessary expenses
(*n*) Right to make a Will
(*o*) Right against adverse possession and exclusion from joint family property
18. Right of survivorship: When lost

Disabilities of Coparceners

19. Manager (Karta)
(*a*) Who is/Who can be
(*b*) His position
(*c*) His powers
20. Manager's liability
(*a*) Liability to render accounts
(*b*) Liability to recover debts due to the family
(*c*) Liability not to alienate coparcenary property
(*d*) Liability not to start a new business without the consent of coparceners
(*e*) Liability to spend reasonably
21. Alienation of coparcenary property
(*a*) Modes of
(*b*) Purpose
(*c*) Who can alienate
(*d*) Alienation by the whole body of coparceners
(*e*) Alienation by the manager or karta of the family
Legal necessities: Illustrations
For the benefit of the Estate: Illustrations
(*f*) Alienation by the father
(*g*) Alienation by the sole surviving coparcener
22. Alienation of undivided coparcenary interest
(*a*) Sale or mortgage
(*b*) Gift
(*c*) Will
23. Rights and remedies of purchaser of undivided coparcenary interest
24. Insolvency of coparcener: Effect of
25. Who may object to alienations
(*a*) Persons who may object
(*b*) Doctrine of overlapping
(*c*) Right of impeachment when lost
(*d*) Limitation
(*e*) *Shivaji Ganpati* v. *Murlidhar*

B. Dayabhaga Law

26. Dayabhaga joint family
(*a*) Essence of coparcenary property
(*b*) Foundation of the coparcenary
(*c*) Passing of property
(*d*) Members of coparcenary
(*e*) Concept of ancestral property
(*f*) Son's interest
(*g*) Power of father
(*h*) Partition and accounts
(*i*) Coparcenary property
(*j*) Power of coparcener
(*k*) Enjoyment of property
(*l*) Presumption
(*m*) Prevalence

A. MITAKSHARA LAW

1. Nature

It is said that the joint family system is the survival of an age when, among the ancient Aryan communities of Asia and Europe, family was the primary

social unit. At that time the Hindu father was the absolute proprietor of the person and property of a family but those days have disappeared and now he merely represents a family. He manages the family property, represents the family in a lawsuit and can not only incur debts on family property but can also transfer the property in case of necessity. In so far as his right over the members of the family is concerned he has no absolute power over them as before but he has to rest satisfied with the custody and guardianship of minor members in the family. He can give a daughter in marriage or take a son in adoption.

As observed in *Indranarayan case*[1] there is a presumption of law that a joint and undivided family is the normal condition of Hindu society. This jointness consists not only in estate but also in food and worship.[1] However if there is severance in food and worship in a joint family, it cannot be said that there is separation in the joint Hindu family.[2] Once jointness of the family is proved up to a certain date, the onus of proving separation after the date lies on the party who alleges such separation.[3] There is however no presumption that such a family possesses joint property; this has to be proved[4] by leading suitable affirmative evidence. This leads us to assert that existence of a joint estate is not a requisite constituent of a joint Hindu family. Consequently a joint Hindu family may exist even without having joint property. The reason for this position lies in the fact that a Hindu gets a joint family status by birth and joint family property is only an adjunct of the joint family.[5] The presumption of jointness is stronger in case of near relations like father, sons, brothers and the remoter one goes, the weaker it becomes.[6] Modern conditions of society have weakened this presumption.[7] Thus the chord that binds the members of a family is not property but relationship. A joint Hindu family is not a juristic person. It therefore cannot hold property independently of its members.[8]

Unless it is shown that there was partition, the presumption of a family being joint remains. A member of a joint Hindu family cannot say that he is joint with some members of the family and separate with others; because either he is a member of the joint family or he is not.[9] There is no middle path.

A joint family may be broken up by separation of its individual members. It may also be broken up by partition of its property. The separating member would then form a new family with his descendants. A new family thus comes

---

1. *Indranarayan* v. *Roop Narayan*, (1971) 1 SCWR 764; *State Bank of Travancore* v. *Aravindan Kunju Panicker*, (1972) 4 SCC 274: AIR 1971 SC 996; *Rukhmabai* v. *Lala Laxminarayan*, AIR 1960 SC 335; *Bhagwan Dayal* v. *Reoti Devi*, AIR 1962 SC 287; *see* also *Raghunandan* v. *Brij Kishore*, (1876) 3 IA 154. For concept of Joint Family and Joint Family Property see *Sunil Kumar* v. *Ram Prakash*, (1988) 2 SCC 77, 85: AIR 1988 SC 576: (1988) 1 HLR 573.
2. *Chowdhary Ganesh Dutt* v. *Jewach*, (1904) 31 IA 10.
3. *Deo Narayan Pande* v. *Agyan Ram Pande*, AIR 1927 PC 52.
4. *Ram Narayan Chand* v. *Purnea Banking Corpn. Ltd.*, AIR 1953 Pat 110.
5. *Janki Ram* v. *Nagamani*, 49 Mad 98: AIR 1926 Mad 273.
6. *Ram Gopal* v. *Mohan Lal*, AIR 1960 Punj 226.
7. *Satnarain Pandey* v. *Dhruva Narain*, AIR 1959 All 22.
8. *Gaya Din* v. *Hanuman Prasad*, (2001) 1 SCC 501: AIR 2001 SC 386.
9. *Indranarayan* v. *Roop Narayan*, (1971) 1 SCWR 764.

into existence. In such a case the property which is free in the hands of the acquirer, resumes fetters in the hands of his heirs. (Mayne)

2. Composition

A joint Hindu family consists of persons lineally descended from a common ancestor and includes their wives and unmarried daughters. The daughter, on marriage, ceases to be a member of her father's family and becomes a member of her husband's family. The joint Hindu family is thus a larger body consisting of a group of persons who are united by the tie of *Sapindaship* arising by birth, marriage or adoption. The fundamental principle of the Hindu joint family is *Sapindaship*. Without that it is impossible to form a joint Hindu family. With it as long as a family is living together, it is almost impossible not to form a joint Hindu family. It is the family relation, the Sapinda relation which distinguishes the joint family and is of its very essence. The joint Hindu family, with all its incidents, is thus a creature of law and cannot be created by act of parties, except to the extent by which a stranger may be affiliated to the family by adoption.[10] It has no distinct and separate legal personality from that of its members, although it functions as a unit and is managed and represented by the eldest and surviving male member, known as *karta* or manager of the family.

Hindu Undivided Family (HUF) and joint family are synonymous terms for the purpose of income tax.[11] It is neither a firm nor an association of persons. It is a separate entity by itself.[12] It is a legal expression which has been employed in taxation laws having a definite connotation and embodying the meaning ascribed to the expression "Hindu joint family."[13] A joint Hindu family is thus a unit to which no outsider can be admitted by agreement;[14] it is a status which can only be acquired by birth or adoption.[15]

(*a*) *Its members*.—A joint Hindu family consists of males lineally descended, however remotely, from a common ancestor and includes their wives, adopted children and unmarried daughters. According to Shastric Hindu law widowed daughters that return to their parental family, illegitimate sons of males and female slaves also were included in a joint Hindu family. Besides this, collaterals and sons born out of marriage between a Hindu male and Christian woman under the Special Marriage Act are included in it. Such a family consists of one male and one female member, or even two females only, so long as it is possible to add a male member to it by birth or by adoption.

There may be a joint Hindu family consisting of a single male member and widows of deceased coparceners.[16]

---

10. *Surjit Lal Chhabda* v. *CIT*, (1976) 3 SCC 142, 149; *N.V. Narendranath* v. *CWT*, (1969) 1 SCC 748: (1969) 3 SCR 882: AIR 1970 SC 14: 10 Bom LR 184; *Abraham* v. *Abraham*, 9 MIA 195.
11. *Ibid.* at p. 147.
12. *ITO* v. *Ram Prasad*, (1973) 3 SCC 25: AIR 1974 SC 454: (1972) 86 ITR 145.
13. *CWT* v. *Champa Kumari*, (1972) 1 SCC 508: AIR 1972 SC 2119: (1972) 83 ITR 720.
14. *Surjit Lal Chhabda* v. *CIT*, (1976) 3 SCC 142.
15. *Ram Kumar* v. *CIT*, AIR 1953 All 150.
16. *Gowli Buddanna* v. *CIT*, AIR 1966 SC 1523: (1966) 60 ITR 293.

(*b*) ***Enjoyment of property and Karta.***—Every member of a Mitakshara joint family has the following rights:

(*i*) the right to residence and maintenance;

(*ii*) the right to have a partition;

(*iii*) the right to joint possession and enjoyment of the property; and

(*iv*) the right to call for an account incidental to his right.

The head of the joint Hindu family is called its Karta.

3. Essential features

The essential features of a joint Hindu family are as follows[17]:

(*i*) *Unity of ownership* of the joint family property among its coparceners;

(*ii*) *Unity of possession* of such property among its coparceners; and

(*iii*) *Unity of juristic existence* of the joint family in dealing with third parties.

As held by the Privy Council,[18] there is a community of interest and unity of possession amongst all the members of such a family. If any one of them dies the others may well have by survivorship that in which they had during the deceased's lifetime a common interest and a common possession. While the family is joint, no particular member can put a finger on a part of property and say that he has a definite share (say 1/3rd or 1/4th) in it.[19] The constitution of a Hindu joint family may change by (1) birth, (2) adoption, (3) marriage, or (4) death of a member. As regards strangers, it is a single individual, separate legal entity or a juristic person on whose behalf contracts are entered into and enforced.[20]

A joint family is a unit, it is not a juristic person;[21] it is essentially a creature of law. It is not a corporation. It has no legal personality of its own which is distinct and separate from its members who constitute it. It is different from a composite family which is a creature of custom.[22]

4. Hindu coparcenary

In the beginning of this chapter we have seen that a joint Hindu family consists of all persons lineally descended, however remotely, from a common ancestor. Such a family includes wives and unmarried daughters of male members and the existence of joint property is not an essential requisite for its constitution. This whole body of such a family, consisting of males and females, constitute a sort of corporation and some of the male members of this family constitute a coparcenary.[23]

---

17. *Shri Ram* v. *Collector, Lahore*, AIR 1942 Lah 173: ILR 1942 Lah 717 (FB): 202 IC 114 (FB).
18. *Katamma Natchiar* v. *Raja of Shivagunga*, (1863) 9 MIA 543, 611.
19. *Approvier* v. *Rama Subba Aiyar*, (1886) 11 MIA 75, 89.
20. *Shankar Lal* v. *Toshan Pal Singh*, 150 IC 151: AIR 1934 All 553.
21. *Ram Kumar* v. *CIT*, AIR 1953 All 150.
22. *Anchuru* v. *Gurijala*, AIR 1961 AP 534.
23. For explanation of this concept see *Sunil Kumar* v. *Ram Parkash*, (1988) 2 SCC 77, 85: AIR 1988 SC 576: (1988) 1 HLR 573.

As expressed in *Laxminarayan case*[24] the male members of a Mitakshara joint family, who acquire by birth an interest in the joint property form a coparcenary. A Hindu coparcenary is a much narrower body than the joint family, because the female members are not included in the coparcenary.

A coparcenary starts with a common male ancestor with his lineal descendants in the male line within four degrees, inclusive of the ancestor, though it may consist of collaterals after the death of the common ancestor. On the death of a coparcener, his interest passes to the others by survivorship[25] who, on partition, would be entitled to demand a share, while other members of the family are only entitled to maintenance.

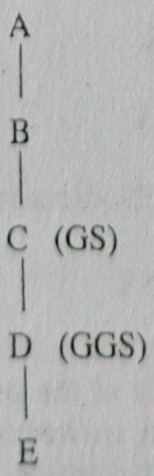
(*a*) ***Formation of a coparcenary***.—A Hindu coparcenary is, thus, a much narrower body than a joint Hindu family and the existence of ancestral or joint family property is essential for its constitution.[26]

To illustrate, suppose *A* has a son *B* and a grandson *C*. *A*, *B* and *C* will form a coparcenary and they are coparceners in the ancestral property in the hands of *A*.

Now, suppose a son *D* is born to *C*. *D* will also be a coparcener with *A*, *B* and *C*, as the fourth in degree from the common ancestor *A*. However if *D* gets a son *E*, *E* will not be a coparcener so long as *A* is alive. On *A*'s death, he will step into the coparcenary of which the common ancestor will now be *B*. If *B*, *C* and *D* all die in the lifetime of *A*, there will be a break of more than three degrees between *A* and *E* and the property on *A*'s death will devolve by succession to his heirs, such as his widow, and will not go to *E* as his right to take by survivorship is extinguished.

Every coparcenary includes three generations of males (in unbroken descent) next to the holder of the property. No female can be a coparcener, although she may be a member of the joint family.

Illustration



24. *CIT* v. *Luxminarayan*, AIR 1935 Bom 412: 59 Bom 618.
25. *Mozley & Whiteley's Law Dictionary*, Supplement, 8th Edn., pp. 28-29.
26. *N.V. Narendra Nath* v. *CWT*, (1969) 1 SCC 748: AIR 1970 SC 14; *Govind* v. *Golla*, AIR 1971 AP 363; *Ganta* v. *Ganta*, (1972) 1 Andh WR 306.

(*b*) ***Features of a joint family.***—From what has been discussed above, it becomes clear that a Hindu joint family is a wider expression than a coparcenary. Its three important features which distinguish it from a coparcenary may be laid down as follows:

(1) Number of members in a Hindu joint family are indefinite.

(2) Some members of the family have an interest in its property, while others have only a right to be maintained. Thus there exists an inequality of rights of such members.

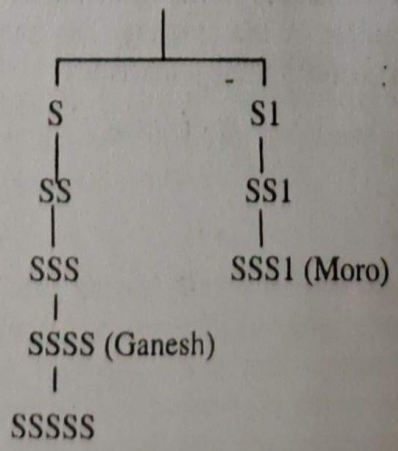
(3) Females are included in the joint family.

(*c*) ***Essentials of a coparcenary.***—Every coparcenary must have a common ancestor to start with; however a coparcenary is not necessarily limited to four degrees from the common ancestor. Common ancestor means the original holder of coparcenary property. A member of a joint family, even if he is removed more than four degrees from the original ancestor, may be a coparcener when he comes within four degrees from the last holder. This proposition is based upon the rule that partition can be effectually demanded by a Hindu, more than four degrees remote from the acquirer or original owner of the property sought to be divided, provided he is not more than four degrees removed from the last holder of the property, however remote he may be from the original owner thereof.[27]

(*d*) ***Moro Vishvanath* v. *Ganesh Vithal*[28]—**

Udhav

*(*The *original holder* of coparcenary property and *common ancestor)*



In this case the point in issue was whether a person removed more than four degrees from the original holder of the property can demand partition of the joint family property? The court answered the point in the affirmative, ruling that such a person can demand partition provided he is not more than four degrees removed from the *last holder*, however remote he may be from the *original holder* thereof.

---

27. *Moro Vishvanath* v. *Ganesh Vithal*, (1873) 10 Bom HC 444.
28. *Ibid.*

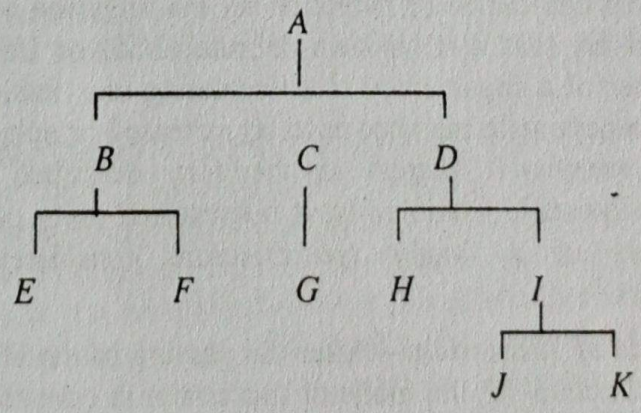
It is the right to partition which determines the right to take by survivorship.[29]

If a question arises as to whether a person is within 4 degrees of the holder, it has to be determined at the date of that person's birth. If he is within 4 degrees, he can demand partition even though at the date of his demand the estate might have gone into the hands of a family member related beyond 4 degrees from him.[30]

One must note an exception to the above rule. Thus where there is a question whether a member of the joint Hindu family is a coparcener or not will depend on his relationship at the time of his birth with the last male holder being within 4 degrees. In the previous illustration the son *E* of the *GGS-D* enters the coparcenary not on his own birth but on the subsequent date when his ancestor *A* dies.

It will be seen therefore that only sons, grandsons (*GS*) and great-grandsons (*GGS*) of the holder of the property take an interest therein by birth. No other descendant can have interest, unless the last holder dies. After the death of the last holder, the coparcenary may consist of collaterals, such as brothers, cousins, uncles and nephews and so on.

(*e*) ***Coparcenary within coparcenary.***—Look at the following example:



A is the original holder of property.

A, along with his three sons *B*, *C* and *D*, and their sons and grandsons constitute the *main joint Hindu family.*

B with his two sons *E* and *F*;

C with his son *G*;

D with his sons *H* and *I* and his grandsons *J* and *K*; and

I with his sons *J* and *K* constitute "branch families".

All these "branch families" have a common ancestor *A*, the head of the main family. Similarly each "branch" family has also its own head, for example *B*, *C*, *D* and *I*.

---

29. *Venkayamma* v. *Venkatramanayamma*, 25 Mad 678 (PC).
30. *Dasarath Rao* v. *Rama Chandra*, AIR 1951 Bom 141: 1952 Bom 31.

Now on the death of *A* (the main head) *B*, *C*, and *D* and their male issues will form a coparcenary.

Later on, when *B* and *C* die the coparcenary will consist of *D*, his nephews *E*, *F* and *G* and his sons *H* and *I* and his grandsons *J* and *K*.

5. Notable features of a Hindu coparcenary

(*a*) ***A creature of law.***—A Hindu coparcenary is a creature of law. Agreement by parties[31] cannot create it. However a stranger could be introduced into a family by adoption so as to become a coparcener.

(*b*) ***No female member.***—Female members cannot be coparceners. They may be members of a Hindu joint family and have right of maintenance out of the property. A wife, even though she has an interest in her husband's property, is not allowed to be her husband's coparcener. But see (*h*) hereafter. This injustice is now removed.

(*c*) ***End of coparcenary.***—On the death of the last surviving coparcener, the coparcenary comes to an end. A coparcenary exists even when there is only a single coparcener. If there is a potential mother who can introduce a new male member either by birth or by adoption, the joint family continues.[32]

(*d*) ***Unity of possession and ownership.***—The whole body of coparceners has in them the ownership and possession of the coparcenary property. No single member can define or depict or lay his finger on a particular portion of property and say that it is his own definite (1/5th or 1/6th) share. Interest of every member of a coparcenary is a fluctuating one, liable to be decreased by the birth of a new male member or to be increased or enlarged by deaths in the family. A member's interest is therefore described as his "undivided coparcenary interest". Community of interest and unity of possession between the members of a family are therefore considered to be important characteristics.[33]

(*e*) ***Mode of succession.***—After the passing of the Hindu Succession Act, 1956, by its Section 19, the mode of succession in case of two or more heirs is determined by providing that "if two or more heirs succeed together to the property of an intestate they shall take the property *per capita* and not *per stripes*, and as tenants-in-common and not as joint tenants". Prior to the Act the sons and grandsons, whose father was dead, and great-grandsons, whose father and grandfather were both dead, succeeded simultaneously as a single heir to the self-acquired or separate property of the deceased with the right of survivorship and such property became ancestral property in their hands.

(*f*) ***Unity of juristic existence.***—As expressed in a Lahore High Court case,[34] the unity of juristic existence is an important feature of a coparcenary.

---

31. *Surjit Lal Chhabda* v. *CIT*, (1976) 3 SCC 142.
32. *Approvier* v. *Rama Subba Aiyar*, (1886) 11 MIA 75.
33. *Katamma Natchiar* v. *Raja of Shivagunga*, (1893) 9 MIA 539.
34. *Sri Ram* v. *Collector*, AIR 1942 Lah 173, 178 (FB).

Unity of juristic existence means that all the coparceners are, as regards the outside world, deemed to be a single individual and this corporate existence is not disturbed by the death of individual members. It is like a corporation having a continuous existence. Its constitution might change by birth, adoption, marriage or death, but as regards strangers, it is deemed to be a single individual, a separate legal entity.[35] Contracts can be entered into and enforced on its behalf.[36]

(*g*) ***Incidents***.—The Supreme Court of India[37] has succinctly laid down the following as incidents of a Mitakshara coparcenary:

> "*Firstly*, the lineal male descendants of a person up to the third generation, acquire on birth ownership in ancestral properties of such person; *secondly*, that such descendants can at any time work out their rights by asking for partition; *thirdly*, that till partition, each member has got ownership extending over the entire property, conjointly with the rest; *fourthly*, that as a result of such co-ownership the possession and enjoyment of the properties is common; *fifthly*, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners; and *sixthly*, that the interest of a deceased member lapses on his death to the survivors."

A son cannot claim partition of coparcenary property in the lifetime of his father. Thus, where a suit was filed by the sons seeking joint possession of two-thirds share in the suit property, it was held that the suit for joint possession was apparently a circuitous method for seeking partition of the property in the lifetime of the father which was not permissible. The suit was held to be not maintainable.[38]

(*h*) ***Coparcenary rights to women in property and death of the Hindu joint family***.—The Law Commission of India in its 174th Report[39] has recommended reforms under the Hindu Law for giving coparcenary rights to women. As per the provisions of the Hindu Succession Act, 1956, under the Mitakshara System of the Joint Hindu Family daughters cannot be members of the coparcenary and devolution takes place by survivorship rather than succession. Recognising the previous injustice to daughters the Commission noted with concern that despite the Constitution of India having proclaimed equality before the law as a fundamental right, a daughter is excluded from participation in ancestral property merely by reason of her gender and this is certainly discriminatory.

To remove these anomalies, Andhra Pradesh in 1986 came up with amendments in the Hindu Succession Act and provided that "a daughter by birth shall become a coparcener in her own right to coparcenary property

---

35. *Sri Ram* v. *Collector*, AIR 1942 Lah 173, 178 (FB).
36. *Shankar Lal* v. *Toshan Pal Singh*, AIR 1934 All 533.
37. *State Bank of India* v. *Ghamandi Ram*, (1969) 2 SCC 33: AIR 1969 SC 1330.
38. *Raghubir Singh* v. *Dalip Singh*, AIR 2004 P&H 220.
39. ILI Newsletter, Vol. 1, Issue 1, April-June 2000, p. 6; *Lawyers' Collective*, Vol. 15, No. 7, July 2000, pp. 3, 11-12.

inclusive of the right to claim survivorship''. Upon partition she is also entitled to an equal share along with a son. This was done by amending the Hindu Succession Act in its application to the State of Andhra Pradesh by Act 13. It was also provided that this property will be held by her and be capable of being disposed by her by will or other testamentary disposition.

Tamil Nadu, Maharashtra and Karnataka followed the Andhra Pradesh Legislature[40] and effected similar changes in their States. However, the State of Kerala had earlier totally abolished the joint Hindu family system by the Kerala Joint Hindu Family (Abolition) Act, 1975, that is Act 30 of 1976, as amended by Act 15 of 1978. It provided that joint tenancy would be replaced by tenancy-in-common as if a partition had taken place among all the members of an undivided Hindu family in respect of their property as and from the date of the Act. It also abrogated the rule of pious obligation of a Hindu son.

Thus the Law Commission is inclined to recommend the total abolition of the joint Hindu family. This appeared to be fair to women. However on further examination it became clear that if the joint Hindu family is abolished as on date and there are only male coparceners then only they would hold as tenants-in-common and women would not get anything more than what they were already entitled to by inheritance. Consequently, the Commission has recommended that daughters first be made coparceners like sons so that they have a right by birth and would be entitled to get their share on partition or on the death of the male coparcener and hold thereafter as tenants-in-common.

As recommended by the Commission a daughter who is married after the Act comes into force will be entitled to her share in the coparcenary property as she will become a coparcener on the date the Act comes into force. This will hopefully end the socially pernicious dowry system with its attendant ills and ameliorate the condition of women in society.

The Law Commission's recommendations are a combination of the Andhra and Kerala models. Besides this the Law Commission has also recommended the deletion of Section 23 of the Hindu Succession Act, 1956, which places restrictions on the right of a female heir to claim partition of the dwelling house.

If enacted by the legislature through a Central Act, changes recommended would go a long way in removing discrimination against women.[41]

6. Joint tenancy of English law and Hindu coparcenary: Difference

Two distinctive features of a Hindu coparcenary: (1) Unity of juristic existence and (2) Unity of ownership are imported, so to say, from the English Law of Real Property. Consequently these features are common to both the

---

40. *See* Andhra Pradesh Act 23/1986 (w.e.f. 5-9-1985) adding Chap. II, Ss. 29-A, 29-B, 29-C; Tamil Nadu Act 1/1990 (w.e.f. 25-3-1989) is the same as A.P.; Chapter II-A *added* by Maharashtra Act 40/1994 (w.e.f. 6-12-1994) adding Ss. 29-A, 29-B and 29-C; State of Karnataka by Act 23/1994 adding Ss. 6-A, 6-B, 6-C after Section 6.
41. ILI Newsletter, Vol. 1, Issue 1, April-June, 2000, p. 6; *Lawyers' Collective*, Vol. 15, No. 7, July 2000, pp. 3, 11-12.

concepts. But so far as the origin and the characteristics are concerned, there are some eight important points of difference between the two which may be laid down as under:

Firstly, the latter is a creation of law and not by an act of parties (i.e. by agreement); while the former is a result of an agreement between the parties.

Secondly, the male issues take an interest in the coparcenary by birth. The sons of joint tenants do not acquire any such interest.

Thirdly, a coparcenary consists of males and they can be traced to a common ancestor.[42] A joint tenancy may be created between two strangers.

Fourthly, a coparcenary can consist only of males, while there is no such restriction in the case of joint tenancy.

Fifthly, the widow of a deceased coparcener is entitled to maintenance, but the widow of a joint tenant has no such right.

Sixthly, the interest of a coparcener fluctuates with births and deaths in the family; in the case of joint tenants, there is unity of interest, as the interest continues to be of the same intensity as from the beginning.

Seventhly, the title of the coparceners arises at different times, i.e. the dates of their respective births. In the case of a joint tenancy the title of all the joint tenants arises at the same time, i.e. the date of the deed (in the case of an agreement) or the date of testator's death (in the case of a Will).

Eighthly, a joint tenancy can be destroyed not only by a partition but also by an alienation of, or an accession to, the interest of a joint tenant. In the case of a coparcenary it comes to an end by partition.

7. Coparcenary property

The joint family property is also called coparcenary property,[43] because its ownership is vested in the coparcenary. The coparceners have the right to alienate it or partition it. The other members do not have these rights. Their rights are of inferior quality.

Property included in Joint Family Property.—The following kinds of properties are included in the joint family property:

(1) Paternal property: (Property inherited from his Father (F), F's F or F's F's F is known as paternal property).

(2) Acquisitions with the help of the joint family property.[44]

(3) Joint acquisition without the help of joint family property.[45]

---

42. *N.V. Narendra Nath* v. *CWT*, (1969) 1 SCC 748: AIR 1970 SC 14.
43. Ram Charan Mitra: *The law of Joint Property and Partition in British India*, TLL (1895-96) (1897), p. 41; H.S. Gaur: *The Hindu Code*, (1923), p. 598.
44. *Raj Kumar Singh Kukam Singhji* v. *CIT*, (1970) 2 SCC 436; *Shibram* v. *Tularam*, AIR 1980 Pat 237.
45. *Proma Bai* v. *Ranchhoddas*, (1992) 2 HLR 655 (AP DB); *Ram Prasad Tewarry* v. *Sheochuran Doss*, (1863-66) 10 MIA 490: 2 Sar 177.

(4) Property blended with joint family property.[46]

(5) Property lost to the family but recovered by any coparceners.[47]

(6) Gift or bequest from paternal ancestor whose intention is to give his separate property to him as a joint family property.[48]

(7) Share allotted on partition.[49]

(8) Government grant — depending upon the intention of the grant.[50]

(9) Property held by sole surviving coparcener[51] which could be known only by analysing the nature of the rights of both the members of the joint family.

(10) Property that is granted by the Government to a member of the joint family as an *inam* or *watan* as his personal impartible property. When such property is resumed or requisitioned by the state, compensation for it retains the character of impartibility.[52] The Government when it abolishes the impartible property it becomes joint family property divisible among all the coparceners. The rule of primogeniture also loses its force.[53] (See Para 11 infra)

Property under the Mitakshara law is divided into two categories:

(*a*) Unobstructed heritage (or Apratibandha Daya), and

(*b*) Obstructed heritage (or Sapratibandha Daya).

In previous pages we have seen that there is property wherein a person acquires an interest by birth. This acquisition is without any impediment whatsoever. In other words, such accrual of right to property being without any obstruction, it is called unobstructed heritage. This can be made clear by an example. Property acquired or inherited by a son from his father, father's father or father's father is an unobstructed heritage.[54] The right to such property arises from the mere fact of his birth in the family. On his birth a son becomes a coparcener. Ancestral property is therefore an unobstructed heritage.[55] For example:

A inherits property from his father *F*. A son *B* is born to *A*. *B* becomes a coparcener with his father *A*, from the moment of his birth. He is therefore

---

46. *Sher Singh* v. *Gamdoor Singh*, (1997) 2 SCC 485; *Sudip Kumar Poddar* v. *Dhirendra Nath Poddar*, (2003) 1 HLR 197 (Cal).
47. *Bajaba* v. *Trimbak Vishwanath Oke*, ILR (1910) 34 Bom 106.
48. *Mudaliar* v. *C.A. Muruganatha Mudaliar*, AIR 1953 SC 495: 1954 SCR 243.
49. *Ramchandra Pillai* v. *Arunschalathammal*, (1991) 3 SCC 847: 1970 UJ SC 390.
50. *Shivappa Tammannappa Karaban* v. *Parasappa Hanammappa Kuraban*, 1995 Supp (1) SCC 162.
51. *Sitabai* v. *Ramchandra*, (1969) 2 SCC 544: AIR 1970 SC 343.
52. *Dattaraya* v. *Krishna Rao*, 1993 Supp (1) SCC 32.
53. *Chandramohan Ramchandra Patil* v. *Bapu Koyappa Patil*, (2003) 3 SCC 552. See Bombay Pargana and Kulkarni Village Watans Abolition Act, 1950 & Bombay Imperior Village Watans Abolition Act, 1958.
54. *Mt. Sirthaji* v. *Alogu Upadhiya*, (1937) 12 Luck 273: 163 IC 935: AIR 1936 O 331.
55. *Anuragi Kuer* v. *Parmanand Pathak*, AIR 1939 Pat 1.

entitled to an equal undivided half-share in such property and the existence of *A*, his father, is not an impediment or obstruction to *B* in acquiring an interest in the property.

Property in respect of which a right accrues not by birth but on the death of the last male owner, without his leaving any male issue, is called obstructed heritage. This is because the accrual of the right to it is obstructed by the existence of the owner. For example property which devolves on parents, brothers, nephews, uncles, etc. upon the death of the last owner is obstructed heritage. Compared with the unobstructed heritage, in obstructed heritage the above relations do not take or acquire any interest in the property by birth. Because their right arises on the death of the last male owner, for them, until this incident takes place, it is a mere *spes successionis* or a bare chance of succession contingent upon their surviving the owner. This can be made clear by the following example:

A inherits certain property from his brother *B*. Now *A* has a son *X*. *X* does not take any interest in the property during *A*'s lifetime. The property is obstructed in *A*'s hands. But after *A*'s death, *X* will take it as *A*'s heir by succession. The existence of *A* is thus an obstruction to the accrual of any rights in the property to *X*.

8. Presumptions as regard coparcenary and coparcenary property

As observed by the Supreme Court of India[56] the term "presumption" in its largest and most comprehensive signification, may be defined to be an inference, affirmative or disaffirmative, of the truth or falsehood of a doubtful fact or proposition drawn by a process of probable reasoning from something proved or taken for granted. Thus, when rules of evidence provide for the raising of a rebuttable or irrebuttable presumption, they are merely attempting to assist the judicial mind in the matter of weighing the probative or persuasive force of certain facts proved in relation to other facts presumed or inferred.

The fact that the father and his family members form a Hindu Undivided Family (HUF), does not necessarily mean that the family possessed joint family properties. Also the mere fact that the father joined his sons in execution of sale deed is no ground to infer that property conveyed under the sale deed was ancestral property, as, generally children of the vendor are joined in execution of sale deed of immovable property by way of abundant caution.[57]

Presumptions govern the burden of proof. Where a question arises as to (*i*) whether a family is joint or separate or (*ii*) whether a particular property belongs to the joint family or is the separate acquisition of a member, the following sets of presumptions are to be followed:

(*a*) ***Jointness in food, worship and estate.***—*Firstly*, every Hindu family is presumed to be joint in food, worship and estate.[58] The burden to prove

---

56. *Izhar Ahmad Khan* v. *Union of India*, AIR 1962 SC 1052: (1962) 2 Cri LJ 215.
57. *T. Subbaraju* v. *T.A. Shivaramma Setty*, AIR 2004 Kant 479.
58. *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, 12 MIA 523.

otherwise lies on the person who alleges separation. Members of the coparcenary may dwell and mess apart and yet they remain joint in estate. Because of the presumption of jointness of the family it cannot be said or further presumed that it possesses a joint family property or any property.[59] Consequently the property held by the manager or any other member of the family is not necessarily joint. The burden of proof, therefore, to prove that a particular property is joint rests upon the person who asserts the same.[60] Thus as observed by the Privy Council in *Jewach case*[61], *cesser in commensality* (i.e. ceasing to dwell and mess together) is not conclusive proof of separation, that it is such an element which may be useful along with other facts.

One may assume that given a Hindu joint family, until the contrary is proved, the presumption that it is joint continues. And as observed in *Yellappa case*[62], the strength of the presumption of union necessarily varies in each case, being stronger in the case of brothers than in the case of cousins and the further one goes from the founder of the family, it becomes weaker and weaker.

(*b*) ***Continual jointness***.—*Secondly*, a family once proved or admitted to be joint is, in the absence of proof of separation, presumed to have continued as joint.

(*c*) ***Partition***.—*Thirdly*, where it is proved or admitted that a partition has taken place, the burden of proving that a particular portion of the family property is still joint, lies on him who alleges it.[63] When it is admitted that there was a partition, the same must be presumed to be complete in all respects as regards the person and property. This presumption is one of fact and not one of law. At the same time the strength of this presumption must vary with each case.[64]

(*d*) ***Possession of property***.—*Fourthly*, on proof that a family is joint and possesses joint property, a presumption arises that all the property in the hands of its members is joint. However, just because a family is joint, it possesses joint property or even any property at all, cannot be presumed.[65] This means that possession of joint property is not a condition precedent to the establishment of the status of members of a joint family.[66]

(*e*) ***Nucleus of joint family***.—*Fifthly*, before it is presumed that the family possessed some joint property a nucleus of joint family has to be established, i.e. the fact that the family had joint property is to be shown.[67] This nucleus is the

---

59. *Baja Bewa* v. *Pandale Bewa*, (1973) 1 CWR 395; *Srinivas* v. *Narayan*, 1955 SCR 1.
60. *Krishna Kumar* v. *Kayastha Pathshala*, ILR 1965 All 483: AIR 1966 All 570; *Srinivas Krishnarao Kango* v. *Narayan Devji Kango*, AIR 1954 SC 379: (1955) 1 SCR 1; *Appalaswami* v. *Suryanarayanamurthi*, AIR 1947 PC 189.
61. *Chaudhry Ganesh Dutt* v. *Jewach*, 31 Cal 262 PC.
62. *Yellappa* v. *Tippanna*, 31 Bom LR 249: AIR 1945 PC 128; *Malak Chand* v. *Hira Lal*, (1936) 11 Luck 449.
63. *Narmadabai Tulsiram* v. *Rupsingh Bhila*, 39 Bom LR 1102; *Kumarappa Chettiar* v. *Adaikkalam Chetty*, 55 Mad 483.
64. *Jagmohan Lakhmichand* v. *Ranchoddas*, AIR 1946 Nag 84.
65. *Annamalai Chetty* v. *Subramanian Chetty*, 31 Bom LR 280; *Raj Shadi Lal* v. *Lal Bahadur*, 35 Bom LR 308 (PC); *Babu Nisar Ahmad Khan* v. *Babu Raja Mohan Manocha*, 43 Bom LR 465 (PC).
66. *Srinivas Krishnarao Kango* v. *Narayan Devji Kango*, AIR 1954 SC 379: (1955) 1 SCR 1.
67. *Daji* v. *Laxman*, 29 Bom LR 122.

source from which or with the help of which[68] the property in question was acquired.[69] Once this is shown the burden shifts to the other party alleging self-acquisition of property.[70] However, the mere existence of a nucleus is not sufficient or strong enough to raise a presumption that the subsequently acquired properties were of the joint family. In such a case therefore the burden of proof will not shift to the other party.

(*f*) ***Acquisition of separate property by a member.***—*Sixthly*, a member of a joint family engaging in trade may make separate acquisitions for his own benefit and they are his self-acquired properties, unless it could be shown that the growth of the business was with the aid of the nucleus of the joint family property or that the business earnings were blended with the joint family estate.[71]

Where a defendant shows by cogent evidence that the suit properties were purchased by him from his own income and there is no evidence on the other hand to show that there was adequate nucleus of joint family with the *Karta* of family out of which the properties were purchased, the properties would be self-acquired of the defendant and cannot be subject of partition.[72]

In *Manicka Poosali*,[73] wherein properties in question having been allotted to the claimant in terms of a registered deed of partition of joint family property, it was held that the only inference was that such properties were self-acquired properties of the claimant.

D.S. Laxmaiah[74] is a pertinent case which shows that a clear intention to abandon the separate rights in the property must be proved. Abandonment cannot be inferred from merely allowing other family members also to use the property or utilization of income of the separate property out of generosity to support persons whom the holder was not bound to support or failure to maintain separate accounts.

It is a well-settled principle of law that property separate or self-acquired of a member of a Joint Hindu Family may be impressed with the character of Joint Family property if it is voluntarily thrown by the owner into the common stock with the intention of abandoning his separate claim therein. But to establish such abandonment a clear intention to waive separate rights must be established. Mere permission to use is no blending.

The burden to prove that such property is a joint family property lies on him who asserts that such property is a joint family property.[75]

---

68. *Kamla Kant Gopalji* v. *Madhavji Meghaji*, (1935) 59 Bom 573: AIR 1935 Bom 343: 37 Bom LR 405: 158 IC 155.
69. *Babubhai Girdharlal* v. *Punam Babu Hargovandas*, 39 Bom LR 846; *Bhimayarapu Subba Reddy* v. *B. Nagi Reddy*, (1973) 1 Andh WR 14.
70. *Appalaswami* v. *Suryanarayanamurthi*, AIR 1947 PC 189; *Srinivasagam Asari* v. *Chinnammal*, AIR 1946 Mad 266.
71. *Hemchandra Ganguli* v. *Matilal Ganguli*, 60 Cal 1253.
72. *Suresh Mahato* v. *Sant Kumar*, AIR 2004 Jhar 44.
73. *Manicka Poosali* v. *Anjalai Ammal*, (2005) 10 SCC 38: AIR 2005 SC 1777.
74. *D.S. Lakshmaiah* v. *L. Balasubramanyam*, (2003) 10 SCC 310.
75. *Lakkireddi Chinna Venkata Reddi* v. *Lakkireddi Lakshmama*, AIR 1963 SC 1601: (1964) 2 SCR 172; *K.V. Narayanan* v. *K.V. Ranganandhan*, (1977) 1 SCC 244: AIR 1976 SC 1715.

9. Distinction between obstructed (सप्रतिबंधदाय) and unobstructed (अप्रतिबंधदाय) heritage

(*a*) Unobstructed heritage devolves by survivorship; obstructed heritage devolves by succession.

(*b*) In the following four cases, however, obstructed heritage also passes by survivorship.[76] As per the Mitakshara school, two or more persons inheriting jointly take as tenants-in-common, except the following four classes of heirs who take as joint tenants with rights of survivorship:—

(*i*) Two or more sons, grandsons and great-grandsons succeeding as heirs to the separate self-acquired property of their paternal ancestor.

(*ii*) Two or more grandsons by a daughter, who are living as members of a joint family succeeding as heirs to their maternal grandfather.

(*iii*) Two or more widows succeeding as heirs to their husband.

(*iv*) Two or more daughters succeeding as heirs to their father, except under the former State of Bombay where they take an absolute interest in severalty.

The above distinction has been recognised only by the Mitakshara school. According to the Dayabhaga school all heritage is obstructed, and not even a son takes an interest by birth. Principle of Survivorship is not recognised by the Dayabhaga school. The Dayabhaga school recognises only the right of succession which accrues for the first time upon the death of the owner of the property.

10. Property: Classification of

Hindu law divides property into two classes: (*i*) Joint family property known as "coparcenary property", and (*ii*) separate property, known as "self-acquired property".

The joint family property or coparcenary property which is of the essence of the notion of a joint family, consists of all the property in which the members have a common interest and common possession[77] and therefore a right of partition. Two main incidents of such property are that (*i*) it devolves by survivorship, and (*ii*) it is the property in which the male issues of a coparcener acquire an interest by birth.[78]

The separate property, on the other hand, is in the exclusive possession of its owner and on his death intestate it devolves by succession to his heirs. All

---

76. D.F. Mulla: *Hindu Law*, S. 31; *Raja Venkatayyama* v. *Venkataramanayyamma*, (1902) 25 Mad 678: 29 FA 156.
77. *Katamma Natchiar* v. *Raja of Shivagunga*, (1863) 9 MIA 543, 611.
78. *Allah Diya* v. *Mt. Sona Devi*, AIR 1942 All 331: ILR 1942 All 745.

property other than joint family or coparcenary property is separate property. It is the property of a Hindu in which no other coparcener, not even his own male issue, acquire an interest by birth.

11. Joint family property: Divisions

Joint family property or coparcenary property may further be divided into the following classes:

(*a*) Ancestral property, that is property inherited from the father, father's father or father's father's father.

(*b*) Property acquired by all or any of the coparceners with the aid of joint family funds.[79]

(*c*) Property acquired by the joint labour of the members, even without the aid of joint family funds, is presumed to be such property in the absence of a contrary intention.[80] This presumption is, however, rebuttable.

(*d*) Property which was originally the separate property of a member (*a*) voluntarily thrown into the common stock, (*b*) with the intention[81] of abandoning all separate claims on it[82] (Doctrine of blending).[83]

Ordinarily there is a presumption against blending of self-acquired property with joint property. The onus of proof lies on him who alleges blending.[84]

(*e*) Accretions to joint family property, such as the income of such property, proceeds of sale of such property and property purchased out of such proceeds, or with the income or aid of such property.

Where joint family property is purchased in the name of a female member, a presumption that it is joint family property does not arise.[85]

Explanation

Property acquired by all . . . with aid of joint family funds

This sort of property is also joint family or ancestral property. Thus accumulations of income (rent, etc.), property purchased out of such income, the proceeds of sale or mortgage of such property and property purchased out of such proceeds are also joint family property. When property is acquired by the family out of a business carried on by them there is a presumption that such property is joint though the business may not have been ancestral. This presumption is

---

79. *Lal Bahadur* v. *Kanhaiyalal*, (1907) 34 IA 65: ILR 29 All 244.
80. *Haridas* v. *Dev Kuvarbai*, 50 Bom 443.
81. *Lal Bahadur* v. *Kanhaiyalal*, ILR 29 All 244.
82. *G. Narayana Raju* v. *G. Chamaraju*, AIR 1968 SC 1276; *Goli Eswariah* v. *CGT*, (1970) 2 SCC 390: AIR 1970 SC 1722.
83. The legal concept of blending is embedded in the idea of conscious surrender of property. See *Madanlal Phulchand Jain* v. *State of Maharashtra*, (1992) 2 SCC 717: AIR 1992 SC 1254.
84. *Govind Dhondo* v. *Godubai Dhondo*, 48 Bom LR 177; *Pearey Lal* v. *Nanak Chand*, AIR 1948 PC 108.
85. *Santanu Kumar Das* v. *Bairagi Charan Das*, AIR 1995 Ori 300.

however rebuttable.[86] The Orissa High Court has, however, held that property which is acquired subsequently to severance of joint family properties, even though with joint funds is self-acquired and has to be excluded from partition.[87]

The general rule seems to be that howsoever small be the help taken from joint family property or funds in acquiring another property, the property acquired assumes the character of joint family property. It is not self-acquisition of property.[88]

Property acquired by joint labour of the members of the joint family

Whether this labour and effort be in a business, or profession or vocation, the property acquired by the members of the joint family becomes a joint family or coparcenary property.[89] The Mumbai High Court has held that such property acquired by the joint labour of all even without the aid of joint family funds is presumed to be joint family property, unless a contrary intention is indicated.[90]

Property thrown into common stock or the Doctrine of blending the property

It may sometime happen that a coparcener may, by his unilateral act, voluntarily[91] throw his own self-acquired property into the common stock with the intention of abandoning all his claims to such property.[92] Throwing may happen by act or conduct. The property thrown into the common stock becomes a part and parcel of the joint family property. This is because of the operation of the Doctrine of blending. Declaration of the member, who throws his property into the common stock, that he intends to do so, makes the property assume the character of joint family property.[93] This situation is made very clear by Ramaswami, J. in *Goli Eswaraiah case*[94], observing that this acquiring of the characteristics of joint family property is not by the mere act of physical mixing with joint family property but by his own volition and intention, by waiving or surrendering his rights in it as separate property. Abandonment of claim and a clear intention must be proved however.[95] An act of generosity and kindness will not ordinarily be regarded as an admission of a legal obligation.[96] From a declaration made in an income tax return no such inference could be drawn.[97]

---

86. *K.V. Narayanaswami Iyer* v. *Ramakrishan Iyer*, AIR 1965 SC 289.
87. *Purnabashi Mishra* v. *Raj Kumari Mishra*, AIR 1995 Ori 284.
88. *Mangal Singh* v. *Harkesh*, 1957 All LJ 752: AIR 1958 All 42.
89. *Lal Bahadur* v. *Kanhaiyalal*, 34 IA 65: ILR 29 All 244.
90. *Haridas* v. *Dev Kuvarbai*, 50 Bom 443; *Baja Bewa* v. *Pandale Bewa*, (1973) 1 CWR 395; *Sidh Sahu* v. *Jhuma Dei*, AIR 1977 Ori 45; *Binod* v. *Abdul Hamid*, AIR 1975 Ori 159.
91. *K.V. Narayanan* v. *K.V. Ranganandhan*, (1977) 1 SCC 244: AIR 1976 SC 1715.
92. *Balak Ram* v. *Shiv Ram*, (1988) 24 Reports JK 22.
93. *G. Narayana Raja* v. *G. Chamaraju*, AIR 1968 SC 1276.
94. *Goli Eswariah* v. *CGT*, (1970) 2 SCC 390: AIR 1970 SC 1722.
95. *D.S. Lakshmaiah* v. *L. Balasubramanyam*, (2003) 10 SCC 310; *Lakkireddi Chinna Venkata Reddi* v. *Lakkireddi Lakshmamma*, AIR 1963 SC 1601: (1964) 2 SCR 172; *K. V. Narayan* v. *K.V. Ranganandhan*, (1977) 1 SCC 244.
96. *Lakireddi Chinna Venkata Reddi* v. *Lakireddi Lakshamma*, AIR 1963 SC 1601; *Goli Eswariah* v. *CGT*, (1970) 2 SCC 390.
97. *Jupudi Bhaskar* v. *Jupudi Rao*, AIR 1944 AP 134.

There exists, however, a general presumption against blending of self-acquired property with joint family property. The rule is that one who alleges such a blending, must prove it.[1] Mere mortgaging separate property with joint family property for raising funds for a family does establish blending.[2]

In *P.S. Sairam* v. *P.S. Rama Rao Pissey*[3] immovable property was in the name of individual member of joint family. Presumption was that the same belongs to joint family; but no such presumption can be applied to business.

12. Incidents of joint property and separate property

The following are the main points of difference between joint property or coparcenary property and separate property, which go to show their respective incidents:

(*a*) ***Devolution***.—When a coparcener dies, his undivided interest in the joint family property devolves by survivorship to the surviving coparceners. It does not devolve by succession to his heirs.[4] In case of separate property of an intestate coparcener, on his death it passes by succession to his heirs, but not by survivorship to the surviving coparceners.[5]

(*b*) ***Nature of Interest***.—In joint family property the coparceners have a community of interest and unity of possession; while in case of the separate property, though he be a member of a joint Hindu family it belongs to him exclusively.[6]

Whilst in joint family property a coparcener cannot, at any given moment, predicate that he has a definite share therein (say 1/5th or 1/6th), his share becomes defined and definite on partition only; till then he has his "undivided coparcenary interest" in the property as it is termed. Such an interest remains fluctuating (increasing and decreasing) by deaths and births in the family.[7] It must be noted, however, that when members decide upon partition, a division of status takes place and the share of a demanding partner gets crystallised in a definite fraction.[8]

(*c*) ***Acquisition of interest***.—In ancestral or coparcenary property, the male issues (i.e. sons, grandsons and great-grandsons) acquire interest by birth provided they are not removed more than three generations (or four degrees) from the common male ancestor who holds the property. In case of separate property no other coparcener, not even his own male issue, acquires an interest by birth even though the property is immovable.[9]

---

1. *Pearey Lal* v. *Nanak Chand*, AIR 1948 PC 108.
2. *Raman* v. *Karil Padath*, 1966 Ker LJ 964.
3. (2004) 11 SCC 320: AIR 2004 SC 1619: (2004) 2 CHN 184.
4. *See* Ss. 6 and 30, Hindu Succession Act, 1956.
5. *Katamma Natchiar* v. *Raja of Shivagunga*, (1863) 9 MIA 513, 611.
6. *Ibid.*
7. *Sudarshanam* v. *Narasimbhu*, 25 Mad 149.
8. *CED* v. *Kantilal Trikamlal*, (1976) 4 SCC 643.
9. See *Arunachala Mudaliar* v. *C.A. Muruganatha Mudaliar*, AIR 1953 SC 495.

(*d*) ***Alienation by Will.***—No coparcener, not even the father, could dispose of by Will his undivided interest in the coparcenary property[10] whether it was movable or immovable even with the consent of other coparceners. This was the position as it obtained prior to 1956, i.e. before the passing of the Hindu Succession Act, 1956. But separate property could be disposed of by Will or in any other way.[11] The Hindu Succession Act, 1956, by Section 30 provides that any Hindu may dispose of by Will or other testamentary disposition any such interest. Under Section 27 of Jammu and Kashmir Hindu Succession Act, the interest of a coparcener can be disposed of by Will.[12]

(*e*) ***Alienation by gift.***—A coparcener could not alienate his "undivided coparcenary interest" in property by way of gift, without the consent of other coparceners. To this rule there is one exception, that a father may make a gift of a small portion of ancestral property within certain limits and under certain circumstances. This position stands even today and the Hindu Succession Act, 1956 has made no provision in this regard as it made in regard to alienation by will. On the other hand separate property can be gifted away by its owner to anyone and to any extent without any restriction.[13]

(*f*) ***Alienation by sale or mortgage.***—Excepting Mumbai, Chennai and Madhya Pradesh the restriction which is there in the case of a gift (above) obtains in the case of alienation by sale or mortgage. To this general rule the following are the exceptions:

(*i*) the manager of a Hindu joint family may alienate, for value, i.e. by sale or mortgage, a portion (or even the whole) of such property (including not only his own interest but also that of the other coparceners including minors) for a legal necessity; or

(*ii*) for the benefit of the estate even without the consent of other coparceners;

(*iii*) a father may further alienate not only for legal necessity or for the benefit of the estate but also for the payment of his antecedent debts, not incurred for illegal or immoral purposes.

In the case of separate property whether movable or immovable it is alienable at the coparcener's pleasure without consent of other coparceners and without consent of his male issue.[14]

(*g*) ***Partition.***—A joint family property or coparcenary property is liable to partition, but the separate property of a member is not so liable.

(*h*) ***Summary in a tabular form.***—

	Joint Property or Coparcenary Property	*Separate Property*
(1)	It devolves by survivorship.	Devolves by Succession.

10. *Lalta Prasad* v. *Shri Mahadevji*, 42 All 461: AIR 1920 All 116.
11. *Arunachala Mudaliar* v. *C.A. Murugantha Mudaliar*, AIR 1953 SC 4951.
12. *Lakshmi Chand Khajuria* v. *Ishroo Devi*, (1977) 2 SCC 501.
13. *Arunachala Mudaliar* v. *C.A. Murugantha Mudaliar*, AIR 1953 SC 4951.
14. *Ibid.*

(2)	Its nature of interest is community of interest and unity of possession of all coparceners.	Other members do not have interest in it.
(3)	Acquisition of interest is by birth.	It is not so.
(4)	Prior to 1956, alienation by will not allowed.	Even prior to 1956 no such restriction existed.
(5)	Gift of undivided interest not allowed, without consent of other coparceners, and	Gift was and is allowed.
(6)	Alienation by sale or mortgage of one's undivided interest without consent of other coparceners not allowed.	There is no such restriction at all.
(7)	Partition of this property is possible.	No such possibility.

13. Ancestral property

(*a*) ***Meaning***.—If we look at the classification of property, there are two main kinds of property, one, separate property and two, joint family property. In its turn joint family property is divided into five classes, out of which ancestral property is one.

As described by the Supreme Court, property is "the right to the use or enjoyment or the beneficial right of disposal of anything that can be the subject of ownership"; it means "estate"; it also means "especially ownership of tangible things . . . anything that may be exclusively possessed and enjoyed . . .; possessions".[15]

As a legal concept, observed the Supreme Court in *Guru Datta Sharma case*[16], it is the sum of a bundle of rights and in case of tangible property would include the right of possession, the right to enjoy, the right to destroy, the right to retain, the right to alienate and so on.[17] In *Munnalal* v. *Rajkumar*[18], a case under the Hindu Succession Act, 1956 wherein this term was interpreted, the Supreme Court observed that the term "property" as used in Section 14(1) and explained in its Explanation has the widest connotation.[19]

In its technical sense it means property which descends to a person in such a manner that his male issue acquires certain rights in it against him. This property is a species of coparcenary property, it is acquired by unobstructed heritage. By the expression "ancestral property" is meant that property which descends from lineal male ascendants in the male line.[20] Sons, grandsons and great-grandsons

---

15. *Nrisingha Murari Chakraborty* v. *State of W.B.*, (1977) 3 SCC 7, 9: AIR 1977 SC 1174: (1977) 3 SCR 521.
16. *Guru Datta Sharma* v. *State of Bihar*, AIR 1961 SC 1684, 1697: ILR 41 Pat 47.
17. See also *Golak Nath* v. *State of Punjab*, AIR 1967 SC 1643, 1709.
18. AIR 1962 SC 1493 reversing *Pratapmull Agarwalla* v. *Dhan Bati Bibi*, LR 63 IA 33.
19. See also *Mangal Singh* v. *Rattno*, AIR 1967 SC 1786, 1789-1793; *G.T.M. Kotturuswami* v. *Setra Veeravva*, AIR 1959 SC 577, 581.
20. *Vijaya College Trust* v. *Kumta Co-op. Arecanut Sales Society Ltd.*, AIR 1995 Kant 35.

acquire therein an interest by birth. Property inherited from a female is not ancestral property.[21]

(*b*) ***Classification***.—As regards the source wherefrom it is obtained it may be classified under the following heads:[22]

(*i*) property inherited from a paternal ancestor;

(*ii*) property inherited from a maternal grandfather;

(*iii*) property inherited from collaterals or from females;

(*iv*) share allotted on partition;

(*v*) property obtained by gift or will from a paternal ancestor;

(*vi*) accretions.

(*i*) *Inheritance from a paternal ancestor.*—Property inherited from a direct male ancestor not exceeding three degrees higher than himself is ancestral property. This property is held by him in coparcenary with his male issue.[23]

The word "ancestor" in its ordinary meaning includes an ascendant in the maternal as well as the paternal line. However, the expression "ancestral estate" wherein under Hindu law a son acquires jointly with his father an interest by birth, must be confined to the property descending to the father from his male ancestor in the male line. Consequently, the property which does not come by descent from a lineal male ancestor, in the male line, is not deemed to be ancestral property in Hindu law.[24] In ancestral property sons acquire interest by birth, jointly with their father and equal to that of their father.[25]

Property inherited from other relations do not constitute ancestral property.

A inherits property from his father's father. This is ancestral property as regards his male issues.

Now, if *A* has no son, no son's son, or no son's son's son and he inherits property from his father's father, he holds the same as his absolute property and can deal with it in any manner he likes.

Now again, in such circumstances suppose subsequently *A* begets a son *B*. *B* will get interest in the property by mere fact of his birth and *A* now cannot claim the property as his absolute property.

(*ii*) *Inheritance from a maternal grandfather.*—On this point whether such property is ancestral or not, the decision of the Privy Council in *Mohd. Husain case*[26] is very clear. The Privy Council while deciding this case reversed an

---

21. *Vijaya College Trust* v. *Kumta Co-op. Arecanut Sales Society Ltd.*, AIR 1995 Kant 35.
22. *See also* P.N. Chadha: *Hindu Law*, 4th Edn., (1974), Chap. IX, Note 124.
23. *Mohd. Husain Khan* v. *Babu Kishva Nandan Sahai*, AIR 1937 PC 233: (1937) 64 IA 250: 1937 All 655: 39 Bom LR 979 (PC).
24. *Atar Singh* v. *Thakar Singh*, 35 IA 206.
25. *Venkateswarlu* v. *Chinna Raghavalu*, 1955 Andh WR 39.
26. *Mohd Husain Khan* v. *Babu Kishva Nandan Sahai*, AIR 1937 PC 233: (1937) LR 64 IA 250: 1937 All 655: 39 Bom LR 979 (PC).

earlier ruling of the Chennai High Court[27] given in 1905. In the Chennai case (*supra*), two brothers living as a joint family inherited some property from their maternal grandfather. One of them died leaving a widow. The question that arose was whether the deceased's share in the property passed to his widow by succession or to his brother by survivorship. The Privy Council held that property inherited by brothers was joint property in their hands and consequently the undivided interest of the deceased passed on his death to his brother by survivorship, and not to the widow.

Property inherited by a daughter's son from his maternal grandfather is his separate property and not ancestral in his hands. He can therefore dispose it of in any way he likes.[28]

A maternal uncle is not an ancestor[29] and therefore property inherited from him is not ancestral property.

(*iii*) *Inheritance from collaterals or from females.*—What has been discussed above makes it clear that property inherited by a Hindu person from his collaterals, such as brother, uncle, etc. or property inherited from a female, e.g. his mother, will not be ancestral property but his separate property.

(*iv*) *Partition share.*—On partition of ancestral property when a share is allotted to a coparcener, such a share in his hands becomes ancestral property wherein his sons acquire interest by birth as and when they are born.[30] If the coparcener dies without any male issue such property passes to his heirs by succession. As regards other relatives such a share is separate property.

(*v*) *Property obtained by gift or will from paternal ancestor.*—In *Arunachala Mudaliar case*[31] the question was whether the property received by a Hindu under a will (or by gift) from his father of his self-acquired property is to be regarded as ancestral or self-acquired? Whether such property is ancestral or not depends upon the intention of the ancestor as expressed in the will or deed of gift. If the intention was that the father should take the property exclusively, the property in the hands of the father would be his separate property. On the other hand if the intention was that the father should take the property for the benefit of his branch or family, it would be an ancestral property in his hands, wherein the sons would get equal rights with him in the property. In this case the property was considered as separate property. Thus the answer to the question whether such property is separate property or ancestral property depends upon the intention[32] of the giver.

(*vi*) *Accretions.*—Whatever accumulations and accretions of income accrue to the ancestral property are all ancestral property. Similarly purchases

---

27. *Venkayamma* v. *Venkatramanyamma*, (1905) 25 Mad 678.
28. *Mohd Husain Khan* v. *Babu Kishva Nandan Sahai*, AIR 1937 PC 233: (1937) LR 64 IA 250: 1937 All 655: 39 Bom LR 979 (PC).
29. *Karuppai* v. *Sankarnarayan*, ILR (1904) 27 Mad 300.
30. *Pratap Narain* v. *CIT*, (1967) 63 ITR 505.
31. *Arunachala Mudaliar* v. *C.A. Muruganatha Mudaliar*, AIR 1953 SC 495: 1954 SCR 243.
32. *S. Parthasarathi* v. *CIT*, ITR (1966) 2 Mad 22 (S.N.): AIR 1967 Mad 227.

made or property acquired out of income of or with aid of or with the sale proceeds of ancestral property are also ancestral property.[33] Sons, grandsons and great-grandsons acquire an interest by birth in the income, accretions and accumulation of the ancestral property accrued before their birth and accrued after their birth.

(*c*) ***Father's and son's interest in ancestral property: Nature of.***—Under the Mitakshara law a son, upon his birth, acquires an interest equal to that of his father, in the ancestral property, whether movable or immovable. It must be remembered that his interest is totally independent of his father, i.e. the son claims interest in such property not through his father but independent of him. Consequently a father's transferring his own interest in the property does not affect his son's interest.

(*d*) ***Father's special power of disposition.***—In spite of this position, a father has a special power of disposal of ancestral property in the following three cases:

(*a*) A father, *without the consent of his sons* and *within reasonable limits*, can gift ancestral movable property for: (*i*) indispensable acts of duty; (*ii*) purposes prescribed by the texts of law; (*iii*) support of his family (*iv*) and relief from distress.[34] Such gifts could be made by the father to his wife, son or daughter.[35]

(*b*) Ancestral immovable property could be gifted by a father within reasonable limits, for pious purposes only.[36] No such alienation can be made by a will.

Any other member of a joint family has no such power.[37]

(*c*) A father can sell or mortgage the coparcenary property (including son's interest) for discharge of debts incurred by him before alienation. The debts, however, should not be for immoral purpose. (*See* chapter on Debts.)

14. Separate property

A member of a Hindu joint family can acquire property for himself independently of other members or coparceners. Such a kind of separate acquisition can be dealt with by him, the acquirer, in any manner he likes. If the acquirer dies intestate in regard to this property, it passes to his heirs by succession. Separate property can be acquired in various ways:

(*a*) ***How acquired.***—

(1) Property inherited from a collateral, such as a brother, nephew, cousin or uncle, (i.e. from any person other than his father, grandfather and great-grandfather).

---

33. *Lal Bahadur* v. *Kanhaiyalal*, (1907) 34 IA 65: ILR 29 All 244.
34. *See* Mitakshara, Chap. 1.
35. *Laxman* v. *Ramachandra*, 5 Bom 48.
36. *Ammathayee Ammal* v. *Kumaresan*, AIR 1967 SC 569.
37. *Jawaharlal* v. *Shri Thakur Radha*, 1945 All 177.

(2) A gift made by the father to the acquirer of a small portion of the ancestral property (movables) within reasonable limits on account of affection.[38]

(3) Difference of opinion prevailed among various High Courts whether a gift or bequest by a father of his self-acquisitions to one of his sons was to be treated as separate property of the acquirer or as ancestral property.[39] The Mumbai and Allahabad High Courts treated it as a separate property of the acquirer while the Calcutta, Chennai and Patna High Courts held a contrary opinion.[40] However this conflict was put to rest by the decision of the Supreme Court in *Arunachala case*[41], which approved the Mumbai and Allahabad decisions. The Court observed that such property does not become *ipso facto* ancestral property in the hands of the donee. A Mitakshara father has full and complete control over his self-acquisitions. Without the consent of his sons he can dispose it of in any way and to any extent he likes. He can give it away to a stranger, or make an unequal distribution thereof among his sons, even to the detriment of others and he is here not controlled in any way by any law. However if there is some contrary intention expressed in the deed of gift or will the same has to be respected. In short, it all depends upon his intention whether he wanted to benefit the branch of the family or the individual concerned. The Privy Council also had observed to this very effect in the Mumbai High Court case of *Bahu Rani*[42].

(4) Marriage gifts received by a member.

(5) Property lost to the family but subsequently recovered by a member of the joint family without the aid and assistance of joint family funds. If such property is movable, the recoverer can keep it exclusively for himself but if it is immovable property and the father is the recoverer he can take it exclusively; if the recoverer is another coparcener, he can take 1/4th of it as a reward and 3/4ths of the property would be shared by all the remaining coparceners.[43]

(6) Property acquired by a member by his own exertions and without the aid of joint family funds.

(7) Property obtained as one's share on a partition of joint family (not as regards his son, son's son or son's son's son).

(8) Property devolving upon a sole surviving coparcener, where there is no widow having a child in her womb or having power to adopt a child.

---

38. *Laxman* v. *Ramachandra*, 71 IA 181.
39. *Bahu Rani* v. *Rajendra Bakhsh Singh*, 35 Bom LR 490 (PC); *Jagmohandas Mangaldas* v. *Mangaldas*, 10 Bom 528; *Parsotam Rao Tantia* v. *Janki Bai*, 29 All 354.
40. *Bhagwat Shukul* v. *Mt. Kaporni*, AIR 1944 Pat 298.
41. *Arunachala Mudaliar* v. *C.A. Muruganantha Mudaliar*, AIR 1953 SC 495.
42. *Bahu Rani* v. *Rajendra Bakhsh Singh*, 35 Bom LR 490 (PC).
43. *Bajuba* v. *Trimbak*, 34 Bom 106.

(9) Income of separate property and purchases made from it.[44]

(10) Property obtained by one's own exertions (and not by joint labour with other members of the joint family) without detriment to joint family property.

(11) Property once ancestral but alienated by the family and repurchased by a member out of his self-acquired property.

(12) Property obtained under a grant of government unless it appears that the grant was made for the benefit of the family.[45]

(13) Impartible property and its savings.

(14) Property obtained by gains of learning.

(15) In *Parbati Koer case*[46] an interesting question arose whether the proceeds of a life insurance policy effected by a coparcener on his life was joint family property or separate property. The Court replied that if the policy was taken without detriment to the joint family funds, its proceeds would be the separate property of the coparcener. But in *M. Shanmugha Udayar case*[47] on partition some property was given to a member to discharge the family debts. This property is not that member's separate property because it still retains its ancestral character. However, where certain properties were given to a Karta under a partition deed to discharge a family debt, the property remaining after such discharge would become his self-acquired property.[48]

The salary of a Karta, serving in a Bank, is his self-acquired property.[49]

(16) Income from practice of a hereditary profession is separate property.[50]

(b) Incidents of separate property.—Property obtained under a grant of government unless it appears that the grant was made for the benefit of the family.[51]

A coparcener having his separate property has full ownership over it. He can deal with it according to his free will and intents. No coparcener can object to it. He can make a will thereof and no coparcener can ask for partition in that property.[52]

---

44. *Krishnaji* v. *Moro Mahadeo*, 15 Bom 35.
45. *Datatreya Sitaram Kulkarni* v. *Shankar Mhadji Kulkarni*, 40 Bom LR 118.
46. *Parbati Kuer* v. *Sarangdhar Sinha*, AIR 1960 SC 403.
47. *M. Shanmugha Udayar* v. *Sivanandam*, AIR 1944 Mad 123.
48. *K.V. Narayanan* v. *K.V. Ranganandhan*, (1977) 1 SCC 244.
49. *Piyare Lal A.* v. *CIT*, (1960) 3 SCR 669. *See* also *Goswami Maharaj Govindlalji* v. *CIT*, (1964) 1 ITJ 505 (offering of *Gurbhet* held separate property).
50. *Lakshmi Chand Khajuria* v. *Ishroo Devi*, (1977) 2 SCC 501.
51. *Datatreya Sitaram Kulkarni* v. *Shankar Mhadji Kulkarni*, 40 Bom LR 118.
52. *Lachhmandas* v. *CIT*, AIR 1948 PC 8: 7 IA 277; *Manika Poosali* v. *Anjali Ammal*, (2005) 8 SCC 38.

It is not subject to the principle of survivorship. Therefore on his death his own heirs inherit it.

(*c*) ***Gains of learning***.—In Hindu texts this is called "Vidyadhana". This is an important species of self-acquisition of property. As per the provisions of the Hindu Gains of Learning Act, 1930[53], "learning" means education, whether elementary, technical, scientific, special or general and training of every kind which is usually intended to enable a person to pursue any trade, industry, profession or avocation in life. "Gains of learning"[54] means all acquisitions of property made substantially by means of learning, whether such acquisitions be made before or after the commencement of this Act and whether such acquisitions be the ordinary or the extraordinary result of such learning.

Property acquired by way of such gains of learning shall be held to be the exclusive and separate property of the acquirer[55], notwithstanding—

(*a*) his learning having been, in whole or in part, imparted to him by any member, living or deceased, of his family, or

with the aid of the joint funds of his family, or

with the aid of the funds of any member thereof; or

(*b*) himself or his family having, while he was acquiring his learning, been maintained or supported, wholly or in part, by the joint funds of his family, or

by the funds of any member thereof.

The object of the Hindu Gains of Learning Act, 1930 is to improve the position of female members in a Hindu family. It derives support from the equitable and liberal spirit which pervades the utterances of the Smriti writers. Prior to 1930 income earned by a member of a joint family by practising a profession or an occupation was considered to be joint family property. This rule was archaic and based upon a misconception of the true spirit of the Hindu law which in turn had the effect of stagnation and it breeded most wasteful litigation. This law therefore revives the original doctrine according to which "a man who works for a thing shall be allowed to get it, keep it and consume it in peace".[56]

The Act thus removes the confusions and anomalies of the old law and makes the law uniform as regards self-acquisitions of every kind.

The Act came into force from the 25th of July, 1930 and is retrospective in operation. The term "learning" in Section 2(*c*) is given a wide meaning.

Income from the post in the Indian Civil Service fell within the terms "gains of Science".[57] The salary of a subordinate Judge, who had received slight

---

53. S. 2(*c*).
54. S. 2(*b*).
55. S. 3.
56. M.R. Jayakar: *Gazette of India*, (1929), Pt. V. p. 228 *quoted* in P.N. Chadha's *Hindu Law*, 4th Edn., p. 541.
57. *Gokal Chand* v. *Hukam Chand Nath Mal*, (1920-21) 48 IA 162.

elementary education of an entirely non-professional character, and so far as his knowledge of law was concerned, was a self-taught man, was held impartible.[58] So also gains made by a person, who had received ordinary education as a clerk, a broker and then as a moneylender, personally and without the aid of the joint funds, were held to be his self-acquired property.[59]

15. Ancestral business

In Hindu law, a business is a distinct and heritable asset. Therefore when a Hindu dies leaving a business it descends to his heirs in whose hands it becomes a species of ancestral property.[60] The issues of these heirs acquire in this business an interest by birth as they acquire an interest in case of any other ancestral or joint family property. In the hands of the male issues the business becomes ancestral or joint family business and the family a trading family.[61] The firm which consists of male issues is known as a joint family firm. In the interpretation of the expression "ancestral" or family trade or business a too narrow and rigid construction should not be allowed to be placed on it. It should be construed liberally on the principle on which it is based.

The joint ownership of business created between male issues is not an ordinary partnership arising out of a contract. That is, it is not a result of an agreement between them but the same comes into existence by operation of law.[62] Consequently the ordinary rules of partnership do not apply *in toto* but they stand modified by the general rules of Hindu law which regulate the transactions of joint families. The members of a Hindu undivided family carrying on a family business are, therefore, not partners within the meaning of the Partnership Act.[63]

16. Difference between an ordinary partnership and a Hindu joint family firm

(*a*) ***Creation and nature.***—Partnership is the result of an agreement between the parties, while a Hindu joint family firm is a creature of law as it arises by operation of law.

(*b*) ***Acquisition of interest.***—In the case of a partnership the male issues of a partner do not acquire any interest in partnership property by birth whereas in an ancestral or joint family trade, which is a species of ancestral property, every member of a Mitakshara family acquires interest by birth.

---

58. *Laxman* v. *Jamnabai*, 6 Bom 625.
59. *Metharam Ramrakhiomal* v. *Rewachand Ramrakhiomal*, (1917-18) 45 IA 41; *Piyare Lal Adishwar Lal* v. *CIT*, (1960) 3 SCR 669: AIR 1960 SC 997 (salary of a bank employee is his separate property); *Venkat Subramania Iyer* v. *Eswara*, ILR (1966) 1 Mad 468: AIR 1966 Mad 266.
60. *Modi Nathubhai* v. *Chhotubhai Manibhai*, AIR 1962 Guj 68; *Ram Lochan Ram Lakshmi Prasad* v. *Meikha Sethani*, AIR 1960 Pat 271.
61. *Raghunathji* v. *Bank of Mumbai*, 34 Bom 72.
62. Sections 4 & 5.
63. *Gulab Chand* v. *Manilal*, 16 Luck 302: 192 IC 943; see also *Lala Baij Nath Prasad* v. *Ram Gopal Lachhmi Narayan*, ILR (1938) 1 Cal 369.

(c) ***Death***.—An ordinary partnership, in the absence of a contract to the contrary, is dissolved on the death of a partner while a Hindu joint family trading partnership is not so dissolved on the death of any member thereof.[64] In the case of death the undivided interest of the deceased member in the family firm passes by survivorship to the surviving coparceners, without any dissolution of the firm.

(d) ***Dissolution by notice***.—An ordinary partnership cannot be dissolved before the expiry of a fixed term (if any), except under certain circumstances. In the case of a partnership at will a notice to that effect is required to be served on all the partners.[65] But in the case of a joint Hindu family trading firm it can be dissolved at any time by a simple intimation of the member's definite and unequivocal intention to separate himself from the family and enjoy his share in severalty. Such an intimation may be by conduct, e.g. when a suit for partition is instituted; it need not be in writing.[66]

(e) ***Liability to render accounts***.—A partner, when he retires from the firm, may at any time require the partnership to give him accounts for all past profits and losses. A coparcener has no such right.[67] If there is no direct misappropriation or no fraudulent conversion of moneys for his personal use the manager of a joint Hindu family firm is not liable to account for past dealings or for past profits and losses.[68] The manager may not take as much care as an agent or partner in the case of an ordinary partnership. In the absence of fraud or misappropriation the manager is not liable even for gross negligence in the management of the family business, unless there is an agreement for such a liability.

(f) ***Share in the business***.—In the case of the former, each partner has a definite share by virtue of a contract while in the case of the latter there is no fixed share, except the community of interest. One must remember that a coparcener's undivided interest in the firm is a fluctuating one because of births and deaths in the family. Each partner's share is fixed only on partition.[69]

(g) ***Power to incur debts***.—In the case of the former any partner may bind his copartners for debts incurred for the purposes of their partnership business[70], while in the case of the latter a coparcener cannot contract debts for the purposes of his family business unless he is the manager thereof.[71] A manager can also raise money on personal security for family business. Except the manager no other coparcener has such implied authority.[72]

---

64. *Kishan Gopal* v. *Surajmal*, ILR (1964) 14 Raj 348: AIR 1964 Raj 218; *Baij Nath Prasad* v. *Ram Gopal Lachhmi Narayan*, AIR 1939 Cal 92.
65. S. 43, Partnership Act.
66. *Ramalinga* v. *Narayana*, (1922) 49 IA 168: ILR 45 Mad 489: AIR 1922 PC 201.
67. *Ganpat* v. *Annaji*, 23 Bom 144.
68. *Ibid.*; *Gurdit Singh* v. *Siri Ram*, AIR 1941 Pesh 89: 197 IC 633; see also *Samalbhai Nathubhai* v. *Someshvar*, 5 Bom 38.
69. *Nanchand Gangaram Shetji* v. *Mallappa Mahalingappa Sadalge*, (1976) 2 SCC 429: AIR 1976 SC 835.
70. Ss. 18 & 19, Partnership Act.
71. *Ramamony* v. *Kashinath*, AIR 1960 Ori 199.
72. *Lachman Das, In re*, AIR 1945 Lah 61.

(*h*) ***Extent of liability.***—In the case of an ordinary partnership all the partners are liable not only to the extent of their shares in the firm but their separate property is also liable for the payment of partnership debts.[73] However in the case of a joint Hindu family firm a coparcener who is not the manager of the firm is not liable for the payment of debts of the family firm.

(*i*) ***Right of survivorship.***—In the case of an ordinary partnership a deceased partner's rights and interest do not pass to the surviving partners while in the case of a joint Hindu family firm the undivided interest of a deceased member passes to the remaining coparceners by survivorship.

(*j*) ***Suit in the name of the firm.***—The partnership-firm's name is a fiction of law representing several partners. It is not so with a Hindu joint family business.[74] Such a family business may assume a trade name but it cannot sue in that name. Thus what is true in the case of a partnership firm is not really true of a joint Hindu family business. In such a case it is only the Karta who in his representative capacity can institute the suit or else all the members of the joint family must join as plaintiffs.[75]

(*k*) ***Partnership with strangers.***—In order that the above incidents of a Hindu joint family firm might apply, the business must be of an undivided Hindu joint family. In *Rangoon case*[76] six Hindus, belonging to different families, entered into a business partnership. It was held that the partnership would be governed by the Indian Partnership Act and not by the rules of Hindu law.

Where the manager of a Hindu joint family business entered into a partnership with a third party and contributed capital from joint family funds, no privity of contract can be said to arise between the third party and the family as a whole.[77] The manager, therefore, would be accountable for the profits of the business and on his death the surviving members cannot claim to continue as partners. They also cannot institute a suit for dissolution of the partnership.[78]

(*l*) ***Business by the manager: Whether New or Old.***—No new business can be started by the manager of a Hindu joint family business, so as to bind the other coparceners. Of course with their express or implied consent this can be done.[79] It makes no difference if the manager is the father.

However, there is no harm in extending the family business from one item or commodity to another commodity. A question may arise whether such an extension, etc. amounts to a new business. The answer to this query is supplied

---

73. S. 49, Partnership Act; S. 43, Contract Act.
74. *National Building Material Supply* v. *Ram Manohar Lal*, AIR 1965 All 586 (suit in name of family business held a nullity).
75. *Ibid.*
76. *S.P.R.M.N. Nachiappan* v. *Chettyar Firm of R.M.P.*, ILR (1936) 14 Rang 313.
77. *CIT* v. *Bagyalakshmi & Co.*, AIR 1965 SC 1708.
78. *Sokkannadha* v. *Sokkannadha*, 28 Mad 344.
79. *Tadibulli Tammireddi* v. *Tadibulli Gangireddi*, 45 Mad 281; *Sanyasi Charan Mondal* v. *Krishnadha Banerji*, 49 IA 108.

by a Chennai High Court judgment in *Desu Ratamma case*[80], which informs that it depends upon the nature and type of the extended business, and similarity of the new business with the old one. Thus in determining the question whether the business started by the manager can be regarded as a legitimate extension of the antecedent family business, or whether it is really and in substance a new business, the material consideration is whether the business in question is in its nature the same as, or so allied or similar to, the business which was being previously carried on by the family as to constitute a continuation or a permissible extension of it.

(*m*) *Essence of decided cases*.—From the decided cases as listed below, one may say that in the following cases where the manager of the joint family starts a new business with the aid of a joint family fund, the business would be considered as joint family business.

(*i*) Where the new business is *started* with the express or implied consent of all the coparceners; and all these coparceners are adults and no minor partner is there when it was started[81];

(*ii*) Where the new business is subsequently *adopted* by all the adult coparceners (no minor coparcener existing at that time) and its fruits enjoyed by them all[82];

(*iii*) Where the new business is started by the Karta during minority of a coparcener and having enjoyed its benefits the minor *adopts* it as a family business when he comes of age[83];

(*iv*) Father, grandfather or great-grandfather *starts* a new business and he has no male issue born to him;

(*v*) A sole surviving coparcener *starts* a new business and other coparceners are born subsequently.[84]

One must note that in (*a*), (*d*) and (*e*) above the business becomes a joint family business right from the start while in the remaining cases it becomes a joint family business by adoption. Mere introduction of joint family funds into a new business cannot by itself make it a joint family business.[85] Once the new business is started and minor members are born afterwards who object to the imposition of the liability of the business on them, the Chennai High Court's view is that their objection is not valid and they have to bear the risk and

---

80. *Desu Ratamma* v. *Narayan*, AIR 1947 Mad 252.
81. *Modi Nathubhai* v. *Chhotubhai Manibhai*, AIR 1962 Guj 68; *Angney Lal Narain Das* v. *Angney Lal Munni Lal*, AIR 1951 All 400.
82. *Devendra Ayyar* v. *Ranga Ayyar*, 1935 MWN 480; *Modi Nathubhai* v. *Chhotubhai Manibhai*, AIR 1962 Guj 68.
83. *Venkatchalam* v. *Venkateswara*, AIR 1944 Mad 33: 217 IC 61.
84. *Angney Lal Narain Das* v. *Angney Lal Munni Lal*, AIR 1951 All 400.
85. *Chandmull* v. *CIT*, 66 ITR 347 (Pat).

liability undertaken by the other family members.[86] A contrary view as held by the Patna High Court[87] does not, it is submitted, appear to be correct.

17. Rights of Coparceners

A Hindu joint family consists of all persons lineally descended, however remotely, from a common ancestor and includes the wives and unmarried daughters of male members, and that the existence of joint property is not an essential requisite for its constitution. The whole body of such a family, consisting of males and females, constitute a sort of corporation, some of the male members of which are coparceners, that is, persons who, on partition, would be entitled to demand a share while others are only entitled to maintenance.[88]

The following are the rights of a coparcener:

(*a*) ***Community of interest and unity of possession.***—As observed by the Privy Council in *Katamma Natchiar case*[89]: "There is community of interest and unity of possession between all the members of the family and upon the death of anyone of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession''. Thus until partition, every coparcener has a right to common possession and common enjoyment of the property but no one of them is entitled to exclusive possession of any part of the property nor is he entitled to any special interest therein.[90]

(*b*) ***Joint possession and enjoyment.***—In a coparcenary, the rights of all the coparceners being equal, each of its member can use the property for all necessary purposes. A coparcener can enforce his right of joint possession and enjoyment even by a suit, if need be. He is not bound to sue for partition. The Mumbai High Court[91] therefore rightly says that to hold otherwise would be to compel a coparcener, at the instance of other coparceners and against his will, to break up the family by bringing a suit for partition. No member can claim exclusive possession of the joint family property.[92]

(*c*) ***Right to enforce partition.***—This is one of the important rights of a coparcener. However it must be remembered that he cannot file a suit for declaration of the amount of his share in the property as until partition his share is not definite. In *Appaji case*[93] the Mumbai High Court has recognised one important exception to this right of partition that where the father is joint with his

---

86. *Narayan* v. *Shankar*, AIR 1927 Mad 53: 99 IC 377.
87. *Ganpat Rai Marwari* v. *Sukhdeo Ram*, AIR 1938 Pat 335: 174 IC 218.
88. Mayne's *Treatise on Hindu Law and Usage*, 11th Edn., p. 325; P.N. Chadha: *Hindu Law*, 4th Edn., (1974), p. 226; Mulla: *Principles of Hindu Law*, 10th Edn., pp. 234-236; M.D. Manek: *Handbook on Hindu Law*, 8th Edn., pp. 161-166.
89. *Katamma Natchiar* v. *Raja of Shivaganga*, (1863) 9 MIA 543.
90. *Naranbhai* v. *Ranchhod*, 26 Bom 141.
91. *Ibid.*
92. *Approvier* v. *Rama Subba Aiyar*, (1866-67) 11 MIA 75: 2 Sar 218: 8 WR PC 1; *Sonam Tsering* v. *Kunzang Sherab*, AIR 1982 Sik 26.
93. *Appaji* v. *Ramachandra*, 16 Bom 29 (FB).

father or other collateral members, the son cannot enforce a partition. This exception is recognised by the Punjab High Court but not by other High Courts.

(*d*) ***Right of survivorship***.—When a coparcener dies, his interest survives to the other members, consequently increasing their share in the property.[94]

This right of survivorship is, however, defeated in the following five cases:

(*i*) where the deceased coparcener has left male issues who represent his share on partition;

(*ii*) where the deceased has sold or mortgaged his interest as in Mumbai and Chennai;

(*iii*) where, in execution of a decree against the coparcener his interest is attached;

(*iv*) where such a decree is passed in his lifetime but the judgment-debtor being his father, grandfather or great-grandfather, the interest is not attached; or

(*v*) where the deceased coparcener's interest is vested in the official assignee or receiver on his insolvency;

(*vi*) the right of survivorship may be given up by the coparceners by means of a document expressing their mutual agreement supported by legal consideration.[95] At present the rule of survivorship in the *Mitakshara* coparcenary is abolished by the Hindu Succession (Amendment) Act, 2005. The substituted Section 6(3) of the HSA provides that on the death of a Hindu after the commencement of the Act, his interest in the Mitakshara joint family property shall not devolve by survivorship and the property shall be deemed to have been divided as if a partition has taken place. Succession to the share of the deceased coparcener will take place either intestate or by testamentary disposition.

(*e*) ***Right to manage***.—The seniormost coparcener has a right to manage the coparcenary property and business. If he is suffering from any illness which causes incapacity in him to manage the property or if he has sufficient reason not to do this work, he may not exercise this right.

(*f*) ***Right to renounce***.—A coparcener may renounce his interest in the coparcenary property in favour of all or any of the coparceners.[96] This view of the Chennai High Court is not accepted by the Allahabad and Mumbai High Courts according to whom such a renunciation should be in favour of all the coparceners.

(*g*) ***Right of alienation***.—In Mumbai, Chennai and Madhya Pradesh a coparcener may sell, mortgage or otherwise alienate for value his undivided

---

94. *Sonam Tsering* v. *Kunzang Sherab*, AIR 1982 Sik 26.
95. *Lakshmi Chand* v. *Mst. Anandi*, 45 All 245.
96. *Sarathambal* v. *Seeralan*, AIR 1981 Mad 59: ILR (1981) 1 Mad 419: 1981 HLR 8; *M. Thulasi Ammal* v. *S. Rajaram*, (2000) 2 HLR 528 (Mad).

coparcenary interest in whole or in part and for this consent of other coparceners is not required. In other States such consent is necessary to validate the alienation. An unauthorised alienation is, however, not void altogether but is merely voidable at the option of the other coparceners. The abovesaid restriction applies to leases too.

A creditor who obtains a decree against the coparcener personally may attach and sell his property (undivided) and he may have his interest separated by a suit for partition.

(*h*) ***Right to account.***—A coparcener has no right to demand accounts from the manager of the family unless he brings a suit for partition of the coparcenary.[1] This is the rule but according to Mitakshara law he can bring a suit for accounts without bringing a suit for partition.[2]

(*i*) ***Right to make self-acquisitions.***—A coparcener has every right to acquire property of his own and to keep it as his self-acquired separate property wherein other coparceners would have no claim. Properties acquired by brothers after severance of status cannot be clubbed with joint family properties.[3]

(*j*) ***Right to set aside alienations.***—Alienation of coparcenary property made by the father, manager or any other coparcener, beyond his authority, can be challenged and set aside by a coparcener. Such alienations which are unauthorised can also be set aside at the instance of any afterborn coparcener. This right may be called a right to impeach unauthorised alienations. A transferee acquiring the entire interest in such alienated property can also impeach such a transaction. But a female member of the family has no such right.[4]

(*k*) ***Right to restrain unauthorised acts.***—Any unauthorised act (for example, erection of a building or way or giving joint property as security) of other coparceners in regard to the coparcenary property which occasions a substantial injury to his rights or is a direct infringement of his clear and distinct rights as a member of the family can be restrained by a coparcener. An injunction can be obtained to stop this.

(*l*) ***Right to share of income and savings.***—As seen before no coparcener has a defined and a definite share in the coparcenary property or in its income.[5] As observed by the Privy Council in *Katamma Natchiar case*[6] the entire income of the property or business must be brought to the common purse and used by the members of the family. This is because there is community of interest and unity of possession between all the members of the family.

---

1. *Jagmohandas* v. *Mangaldas*, 10 Bom 528.
2. *Abhayachandra* v. *Pyari Mohan*, 5 Beng LR 347.
3. *Kondiran Bhiku Kirdat* v. *Krishna Bhiku Kirdat*, 1994 Supp (3) SCC 548: AIR 1995 SC 297.
4. *Ram Dei* v. *Mt. Gyorsi*, AIR 1950 All 76.
5. *Girijanandini Devi* v. *Bijendra Narain Choudhary*, AIR 1967 SC 1124.
6. *Katamma Natchiar* v. *Raja of Shivagunga*, (1863) 9 MIA 539.

The savings made by a coparcener from a particular property allotted to him for his maintenance are however the member's separate property.

(*m*) ***Right to maintenance and necessary expenses.***—A coparcener has a right to receive from coparcenary property maintenance for himself, for his wife and children[7] and for those whom he is legally or morally bound to maintain. Unity of possession is the basis of this right which is a right to live upon the fruits of the property. Such a right again is not to any exact fraction of the income. The Karta of the family or the father, in this regard has no larger interest in the income, compared to others.[8] For performance of Sraddha or marriage of a child the necessary amount can be obtained by a coparcener.

(*n*) ***Right to make a will.***—Before the passing of the Hindu Succession Act, 1956, no coparcener, not even the father, had a right to alienate his undivided coparcenary interest by will.[9] By the passing of the Act this bar is removed.[10] However, no gift *inter vivos* by a coparcener, of his undivided interest, is allowable under the Act.[11]

(*o*) ***Right against adverse possession and exclusion from joint family property.***—It must be remembered that possession of a coparcenary property by one coparcener is meant for the benefit of all the coparceners. His separate possession cannot be construed to be an adverse possession to another, unless it was in assertion of his hostile title or it was from its nature inconsistent with joint possession of all. Use and enjoyment of joint property is for all and one cannot be excluded from it by others. The remedy for this lies in procuring an injunction from court restraining the obstructors from obstructing the claimant.[12] The burden of proving such exclusion and his knowledge of such exclusion for a period of 12 years which would bar his right lies on him who asserts such exclusion.[13] The exclusion, however, must be total and complete.[14]

18. Right of survivorship: When lost

In the foregoing pages we have seen the general rule that on the death of a coparcener his undivided interest in the coparcenary passes by survivorship to the other coparceners. It does not pass to his heir by succession.

There is no such thing as succession to property in an undivided family. On the death of a coparcener without leaving a male issue, his undivided

---

7. *Pedasubbayya* v. *Akamma*, AIR 1958 SC 1042; *Rama Rao* v. *Rajah of Pittapur*, AIR 1918 PC 81: ILR (1918) 41 Mad 298: (1918) 45 IA 148: 47 IC 354 known as the *Second Pittapur case*. See also *Cherutty* v. *Nangamparambil Rao*, ILR 1940 Mad 830: AIR 1940 Mad 664: (1940) 2 Mad LJ 358.
8. *CIT* v. *Krishna Kishore*, 44 Bom LR 196 (PC).
9. *Venkatrao* v. *Venkataswar Rao*, AIR 1956 AP 1.
10. *See* S. 30 of the Act.
11. *Ibid.*; *Madras State Bhoodan Yagna Board, Madurai* v. *Subramania Athiman*, AIR 1973 Mad 277.
12. *Anani* v. *Gopal*, (1895) 19 Bom 269; *Ganpat* v. *Annaji*, (1899) 23 Bom 144.
13. *Chandbhai Mahamadbhai Vohra* v. *Hasanbhai Rahimtoola*, 46 Bom 213, 216; *Sheo Raj* v. *Ajudhiya*, 4 Luck 503.
14. *Sobhagsingh Nawalsingh* v. *Pirthesingh Umrao Singh*, AIR 1951 Nag 259.

coparcenary interest does not pass by descent to his heirs but lapses in the joint family property thereby causing an increase in the shares of other coparceners. This is known as the right of survivorship. However, this right is defeated in the following cases:

(*i*) where the deceased coparcener has left male issues, they represent his right to a share on partition;

(*ii*) where the deceased coparcener has sold or mortgaged his interest as in Mumbai and Chennai;

(*iii*) where the coparcener's interest has been attached in execution of a decree against him;

(*iv*) where a decree has been passed in his lifetime and the interest has not been attached in his lifetime, if the judgment-debtor stood in the relation of a father, grandfather or great-grandfather to the surviving coparceners; or

(*v*) where the deceased coparcener's interest has vested in the official assignee or receiver on his insolvency;

(*vi*) where he has disposed of his interest in the coparcenary property by Will[15];

(*vii*) in a case where the deceased coparcener leaves a widow and consequently his undivided interest in the joint family property would be held by his widow[16];

(*viii*) where the surviving coparcener is disqualified, on the ground of his being congenitally a lunatic or an idiot. However, this is not good law now;

(*ix*) where the right of survivorship may be given up by coparceners[17];

(*x*) where the interest of the deceased coparcener has been lost by adverse possession;

(*xi*) where the surviving coparcener is given in adoption to another family. This is so because adoption is in law a civil death in the natural born family.

Disabilities of Coparceners

A coparcener cannot deal with the coparcenary property as he can do with his personal property. He has to obtain the consent of other coparceners. The limitation imposed is for safeguarding the interest of other coparceners. If this was not there he could alienate by making a gift, he could make a substantial change in the joint property. So a Karta alone can manage the property. Other members have to take Karta's permission for this purpose.

---

15. *See* S. 30, Hindu Succession Act.
16. S. 7, Hindu Succession Act.
17. *Lakshmi Chand* v. *Mst. Anandi*, AIR 1926 PC 54: 53 IA 123.

19. Manager (Karta)

(*a*) ***Who is/Who can be.***—The Hindu joint family is governed by the principle of subordination. Its affairs are managed by one person, called the Karta or the manager. As observed by the Mumbai High Court,[18] a Hindu family may be regarded as a corporation whose interests are necessarily centred in the manager, the presumption being that the manager is acting for the family unless the contrary is shown.[19] Unless the Karta or manager relinquishes his right or there are exceptional, extraordinary or compelling circumstances, juniors in the family cannot exercise this right.[20] Even if the Karta is a lunatic, the juniors cannot alienate the property without obtaining a court's order under the Lunacy Act, 1912.[21] K. Ramaswamy J. in this case[22] observed that "*The managership of the joint family property goes to a person by birth and is regulated by seniority*". *He is a "primus inter pares*". Thus the father is ordinarily the manager of the family consisting of himself, his descendants and other relations. After the father's death his elder son generally becomes the manager. It is possible that a more capable son may become the manager, or it is also possible that the senior member may give up his right of management and a junior may act in his place when the senior member is incapacitated due to reasons of health.[23]

The right to become a manager depends upon the fundamental fact that the person on whom it devolves was a coparcener of the joint family. Consequently no female (e.g. a widow)[24] member could be a manager or Karta of a joint family. Even the Hindu Women's Right to Property Act, 1937, has not been able to change this position.[25] Now the Supreme Court in *CIT* v. *Seth Govindram Sugar Mills*[26] settled the controversy and held that she cannot be a Karta. A minor cannot become a Karta.[27] The contrary view taken by the Nagpur High Court in *Trimbak Roji case*[28] does not seem to be correct for the simple reason that a minor cannot give a valid discharge, nor can he enter into a contract on behalf of the family except through a next friend or a guardian. If all sons in a family are minors the court appoints a guardian and his appointment lasts only till the eldest son attains majority.[29]

---

18. *Gansavant Balsavant* v. *Narayan Dhond Savant*, 7 Bom 467.
19. *Abdulla Kunjipok Kasukutty* v. *Ravunny*, AIR 1973 Ker 192: 1973 KLR 350.
20. *Narendrakumar J. Modi* v. *CIT*, (1976) 4 SCC 456, 459: AIR 1976 SC 1953, 1956.
21. *Tribhovandas Haribhai Tamboli* v. *Gujarat Revenue Tribunal*, (1991) 3 SCC 442: AIR 1991 SC 1538: (1991) 2 GLH 24.
22. *Ibid.*
23. *Tribhovandas Haribhai Tamboli* v. *Gujarat Revenue Tribunal*, (1991) 3 SCC 442: AIR 1991 SC 1538: (1991) 2 GLH 24; *Narendrakumar J. Modi* v. *CIT*, (1976) 4 SCC 456: AIR 1976 SC 1953; *Ram Singh* v. *Sri Charan*, AIR 1938 All 147.
24. *Hadu* v. *Sana Bobinda*, AIR 1970 Ori 32; *Radha Ammal* v. *CIT*, (1950) 1 MLJ 399.
25. *V.M.N. Radha Ammal* v. *CIT*, AIR 1950 Mad 538.
26. AIR 1966 SC 24: (1965) 3 SCR 488. Madras and Orissa High Courts were of the opinion that she could not be a Karta; *Maguni Padhano* v. *Lokananidhi Lingaraj Dora*, AIR 1956 Ori 1: ILR 1956 Cut 24: 22 Cut LT 228; *V.M.N. Radha Ammal* v. *CIT*, AIR 1950 Mad 538: ILR 1951 Mad 56: (1950) 1 Mad LJ 399.
27. *Mohideen I. Nachi* v. *Mohd. Ibrahim Saheb*, 39 Mad 608.
28. *Trimbak Roji* v. *Lankara*, ILR 1948 Nag 393: AIR 1948 Nag 324.
29. *Bindaji* v. *Mathurabai*, 30 Bom 152.

The ordinary legal presumption that the eldest member in a family is the Karta is rebuttable.[30] However, there can be not more than one Karta of a joint Hindu family,[31] because according to the Supreme Court the very idea of there being two Kartas of the same family does not appear prima facie consistent with the concept of a Karta.

(*b*) ***His Position***.—His position is not analogous to anything known to English law. The terms "partner", "principal" or "agent" would not strictly apply to him.[32] The Privy Council in this respect observed[33] that "the relation of such persons is not that of a principal or agent or of partners; it is much more like that of trustee and *cestui que* trust''. However, even this comparison does not seem to be true because he is not a trustee in the sense that he is liable to account for his past dealings with the family property nor is he under the same obligation to economise or save as would be the case with a paid agent or trustee.[34]

It must be noted that under the Dayabhaga law the manager's position approximates more closely to that of a trustee than under the Mitakshara law because under the Dayabhaga law he is liable to account for his past dealings with the family property.

Acts of a manager, committed by him within the scope of his authority are binding on the family. He represents the family in all its affairs and his acts are binding on the family provided they are committed for family necessity. He derives his authority not from the consent of the other members of the family (as some of them may be minors and cannot give a valid consent), but he is, as expressed in the Tagore Law Lectures, a sort of *representative owner*, his independent rights being limited on all sides by the correlative rights of others and burdened with a liability coextensive with his ownership, to provide for the maintenance of the family.[35]

The manager represents the widow also — the widow who acquired the undivided interest of her deceased husband in the coparcenary. He can alienate such interest too in case of legal necessity. However, an unjustified alienation of her property may well be challenged[36] by the widow as could be done by a coparcener.

It must be remembered that a widow being not a coparcener, cannot become the manager of the family.[37] This is confirmed by a recent judgment of the Supreme Court of India.[38]

---

30. *Chunilal* v. *Kalu*, ILR (1965) 15 Raj 1073: AIR 1966 Raj 208.
31. *Union of India* v. *Shree Ram Bohra*, AIR 1965 SC 1531.
32. *Amraj Singh* v. *Shambhu Singh*, AIR 1932 All 632.
33. *Annamalai Chetty* v. *Murugesa Chetty*, 30 IA 220.
34. *Ramrao Shamrao* v. *Suganchandra*, AIR 1946 Nag 139.
35. M.D. Manek quoting Mr Cowell, in his *Handbook of Hindu Law*, 8th Edn., p. 169.
36. *Shivappa Laxman* v. *Yellawa Shivappa Shivagannavar*, 55 Bom LR 658; gift of immovable property by the manager challenged by the widow.
37. *Radha Ammal* v. *CIT*, (1950) 1 MLJ 399.
38. *CIT* v. *Seth Govindram Sugar Mills*, AIR 1966 SC 24.

The manager is not entitled to any remuneration.

(*c*) ***His Powers***.—Because a coparcener of a Hindu family is its Karta, he has no larger or special proprietary interests or rights in the family property. However, it has to be noted that his position is superior to that of other coparceners because he manages and looks after the family property and interests of its members. As observed by the Allahabad High Court,[39] in fact he exercises complete authority over the family affairs because so long as partition is not effected, the common interests require protection. Consequently, because of his position as the manager, he has certain special powers of disposition over the whole of the property, including the interest therein of the minor coparceners and even that of the widow of a predeceased coparcener. We may enumerate these powers as under:

(A) Power of alienation of joint family property for legal necessity or for benefit of the estate;

(B) Power of alienation for family business;

(C) Power to start a new business;

(D) Power to contract;

(E) Power to contract debts;

(F) Power to acknowledge debts;

(G) Power to give a valid discharge;

(H) Power to refer to arbitration;

(I) Power to compromise;

(J) Power to represent joint family in suits and other proceedings;

(K) Power over income and expenditure;

(L) Power of guardianship over the undivided interest of minor members.

(A) *Power of alienation of joint family or coparcenary property*

According to the Mitakshara law, a Karta's power to make a valid alienation is confined to the following three purposes:

(*i*) in times of distress, i.e. in times of a calamity affecting the whole family;

(*ii*) for the interest or benefit of the family or for its maintenance;

(*iii*) for pious purposes, say for funeral and other ceremonies.[40]

This power can be used in cases of legal necessity or for the benefit of the estate and it is analogous to that of the manager of an infant heir as explained by the Privy Council in the famous leading case of *Hanuman Parsad* v. *Musammat*

39. *Jagmohan Dass* v. *Kunwar Singh*, AIR 1926 All 532.
40. *Budhi Fena* v. *Dhobai Nai*, AIR 1958 Ori 7: ILR 1957 Cut 574.

Babooee[41]. The principle laid down in this case has been held to apply to alienation by the manager of a joint Hindu family.[42]

The manager has an implied authority to do what is best for all and no coparcener can defeat his exercise of power by withholding his consent. He may alienate the property so as to bind the interest of others and his own interest provided it is made:

(*i*) with the consent of all the coparceners in existence at the time of alienation, they all being adults;[43] or

(*ii*) for legal necessity; or

(*iii*) for the benefit of the estate.

In the last two cases the consent of other coparceners can be dispensed with and alienation can be made even without their consent. This means that the last two cases are cases of established necessity wherein no consent is necessary. Conversely, where there is no legal necessity or no benefit to the estate the alienation will however be valid if it is made with the consent of all the coparceners, all of them being adults.[44] If alienation is made without the consent of all, it would bind the shares of the consenting members in the States of Tamil Nadu, Maharashtra and Gujarat, but not in West Bengal and U.P.

It must be noted that an alienation by the manager which is not for a legal necessity or not for the benefit of the estate and made without the consent of coparceners is, however, not void *ab initio*. It is voidable at the instance of other coparceners. Consequently, the alienation is valid and binding till avoided.[45]

As regards powers of alienation over the family property for purposes of necessity or benefit as said above, the manager under the Dayabhaga law has the same powers as under the Mitakshara Law.[46]

In the case of *Sunil Kumar*[47] a coparcener filed a suit against his father, the Karta of the family, for a permanent injunction to restrain him from alienating joint family property for a legal necessity. The Supreme Court held that he could not do so; his remedy was to challenge the sale and get it set aside after the sale was completed.

(*i*) *Legal Necessity.*—"Legal necessity" does not mean actual compulsion; it means "pressure upon the estate" which in law may be regarded as serious and sufficient.[48] In *Hanuman Parsad case*[49] the Privy Council observed in this

---

41. (1856) 6 MIA 393.
42. *Baboo Kameswar Pershad* v. *Ram Bahadur*, 8 IA 8: (1881) 6 Cal 843 (PC); *Surendra* v. *Nandan*, (1874) 21 WR 196.
43. *Kandasami* v. *Somakanda*, (1912) 35 Mad 177; *Balmukand* v. *Kamla Wati*, AIR 1964 SC 1385.
44. *Sahu Ram* v. *Bhup Singh*, 44 IA 126.
45. *Mukhtiar Singh* v. *Amarjit Singh*, 1975 Cur LJ 121.
46. *Bejoy Kumar Saha* v. *Ramapati Basu*, AIR 1942 Cal 533.
47. *Sunil Kumar* v. *Ram Parkash*, (1988) 2 SCC 77: AIR 1988 SC 576.
48. *Rani* v. *Santa Bala Debnath*, (1970) 3 SCC 722: AIR 1971 SC 1028; *Mukhtiar Singh* v. *Amarjit Singh*, 1975 Cur LJ 121.
49. *Hanuman Parsad* v. *Musammat Babooee*, (1856) 6 MIA 393.

regard that: ". . . the actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded . . . ." The touchstone of the authority is the necessity which implies not actual compulsion, but the kind of pressure which the law regards as sufficient and serious. The necessity thus connotes the idea of warding off an evil or doing of something which cannot be avoided. It involves a notion of pressure from without.[50]

(1) *Illustrations.*—The following are illustrations from decided cases in regard to legal necessity or family necessity for which the manager of the family may contract a debt or make an alienation:

(*i*) maintenance of all the members of the joint Hindu family, i.e. all persons lineally descended from a common ancestor, their wives and unmarried daughters[51];

(*ii*) marriage expenses of coparceners and their daughters[52];

(*iii*) performance of funerals and other ceremonies;

(*iv*) payment of government revenue;

(*v*) payment of debts incurred for family necessity or family business[53]; Time barred debts are not covered by legal necessity;

(*vi*) payment of debts due to a landlord or payment under a decree for arrears of rent;

(*vii*) cost of building a residential house for the family;

(*viii*) expenses for litigation which have become imminent and absolutely necessary under the circumstances[54];

(*ix*) cost of necessary litigation in recovering or preserving the estate of the family;

(*x*) cost of defending the head or any other member of the family against a serious criminal charge;

(*xi*) expenses of litigation in respect of abduction of a female member of the family;

(*xii*) expenses of litigation relating to the adoption of a son;

(*xiii*) redemption of mortgage of family property;

(*xiv*) sale of family property for adjusting the shares of the members of the family;

(*xv*) expenses for augmenting the means of livelihood of the family, unless it is risky or speculative;

---

50. *Ragho* v. *Zaga*, 31 Bom LR 361.
51. *Pathak* v. *Pathak*, AIR 1967 Guj 192.
52. *Rull* v. *Jagdish*, AIR 1973 P&H 335; *Sellappa* v. *Suppan*, ILR 1937 Mad 906.
53. *Fakirappa* v. *Venkatesh*, AIR 1977 Kant 65.
54. *Kalu Singh* v. *Sandrabai*, AIR 1926 Nag 449.

(*xvi*) cost of repairing a residential house for the family;

(*xvii*) performance of the *sraddha* (श्राद्ध), funeral and other religious ceremonies of the family;

(*xviii*) similar purposes as above provided if they cannot be met out of the income of the family or the cash in hand.

However, (*i*) expenses for assisting police in prosecution of a coparcener's murderer, or (*ii*) an alienation for purposes of a speculative nature, (*iii*) payment of time-barred debts, and visits to sacred places unconnected with any religious purposes of an obligatory character are not covered under the term "legal necessity".

A Karta of a joint Hindu family selling properties for migrating to a different place for better living can be said to be selling them for legal necessity. Similarly selling property for discharging antecedent debts is also selling it for a legal necessity.[55] But where there is no proof of intention to benefit the family the sale would not be a sale for legal necessity.[56]

If a manager makes an alienation without any legal necessity, in the States of Tamil Nadu, Madhya Pradesh and Gujarat, it would be valid to the extent of the manager's share therein. The purchaser in such a case would be entitled to the manager's share in such property.

(2)(*i*) *Burden of proof.*—The burden of proof of legal necessity lies on the person who pleads it. The purchaser must in such cases prove that a proper and bona fide inquiry was made into the existence of the necessity and he did all that was necessary to satisfy himself as to the existence of such necessity. Mere recitals in this regard in a document of sale or mortgage would not do.[57] Weight to recitals attaches according to circumstances. However, the purchaser of property is not bound to satisfy himself that the money received was actually applied by the seller to meet the necessity. If the purchaser proves either (*i*) consent of all, or (*ii*) legal necessity, or (*iii*) bona fide inquiry the alienation will be upheld.

(*ii*) *Benefit of the Estate.*—As said before an alienation may be justified not only in case of need or legal necessity but also for the "benefit of the estate". Of course in a broader sense legal necessity includes the benefit of the estate.[58]

Like "legal necessity", the term "benefit of estate" defies a precise definition. The manager of the joint Hindu family has an implied authority to do his best for all concerned. The test whether the transaction was one into which a prudent owner would enter in order to benefit the estate would be a very effective one. The word "necessity" covers not only actual pressure on the estate or a danger to be avoided by prompt discharge of liabilities but also an act of

---

55. *Vanimisatti Anil Kumar* v. *Jayavarapu Krishna Murty*, AIR 1995 AP 105.
56. *B. Ranga Rao* v. *G. Venkat Krishna Rao*, AIR 1996 AP 5.
57. *Rani* v. *Santa Bala Debnath*, (1970) 3 SCC 722: AIR 1971 SC 1028.
58. *Nagindas Maneklal* v. *Mahomed Yusuf Mitchella*, ILR (1922) 46 Bom 312: AIR 1922 Bom 122.

benefiting the estate. These two terms — legal necessity and benefit of the estate — are however not identical, though they overlap.

From decided cases there emerges a central and basic principle that immovable property is far more stable and safe than liquid money and any alienation of the former cannot be accepted as legal unless a very strong case is made out for the same.[59] The prudence that is required of a manager in such cases is the prudence of an honest or conscientious trustee.[60] To protect the estate from extinction or protecting it from deteriorating by innundation, or the defence of it against hostile litigation are the objects covered under this expression. It is, however, difficult to draw a line between "acts beneficial to the estate" and acts which are not so. The Supreme Court while deciding this point has observed that to be for the benefit of the estate a transaction need not be of a defensive character. A court must therefore satisfy itself that the transaction has conferred some benefit on the family.[61] The reader must therefore rest satisfied with the following illustrative examples[62] of such transactions instead of searching for the precise definition of transactions entitled "for the benefit of the estate".

(1) *Illustrations.*—(*i*) acquisition of some property made for the interest of the family; for example to enlarge its means of subsistence;

(*ii*) sale of field for purchase of another close to his other field for convenience of cultivation;

(*iii*) sale of lands situate in an unhealthy place for the purpose of buying lands in an advantageous locality;

(*iv*) sale of properties in order to migrate to another place and purchase lands there which are more productive;

(*v*) sale of inconveniently situated, unproductive property of the joint family for the purpose of investing the proceeds thereof in another sound investment;[63]

(*vi*) a mortgage for purchase of a residential house which was used for carrying on business too;

(*vii*) sale of a dilapidated house not fetching any rent and which the municipality wanted to pull down;

(*viii*) sale of property yielding a small income and difficult to manage for extension of the existing family business;

(*ix*) a mortgage for making additions to and improvements in the family house; .

---

59. *Nirmal Singh* v. *Satnam*, ILR (1960) 10 Raj 999: AIR 1960 Raj 303; *Balmukand* v. *Kamla Wati*, AIR 1964 SC 1385.
60. *Ibid.*; *Palaniappa Chetty* v. *Deivasikamony Pandara*, (1916-17) 44 IA 147.
61. *Balmukand* v. *Kamla Wati*, AIR 1964 SC 1385.
62. Chadha: *Hindu Law*, 4th Edn., Chap. XI, pp. 301-304.
63. *Hari Singh* v. *Umrao Singh*, AIR 1979 All 65.

(*x*) a mortgage of a family tea garden for the purpose of maintaining the garden and a factory which was the source of income to the family;

(*xi*) sale of small shares in inferior lands in three different villages to acquire a compact share in fertile land in one village;

(*xii*) a gift to a stranger of a small portion of land with a view to defeat the claim of pre-emption.

(2) *Onus of proof.*—It lies on the alienee to prove that (*i*) there was either legal "necessity in fact" which justifies the alienation, or (*ii*) that he had made a proper and bona fide inquiry into the alleged necessity and satisfied himself of its existence. If he fails to prove the "necessity in fact", the alienation may still be upheld if he proves that he had inquired and satisfied himself as to its alleged necessity and that the facts represented to him were such, as, if true, would have justified the transaction.[64]

(B) *Power to alienate for family business*

As observed by the Privy Council in *Shri Thakur Ram case*[65], an alienation of property for purposes of family business is an alienation for legal necessity (*see* above, legal necessity). To carry on a family business necessarily implies a power to mortgage or sell the family property for the ordinary purposes of the business. In this regard the manager's powers, duties and functions may appear to be similar to those of trustees strictly so called but his position is not akin to that of a trustee or an agent.

(C) *Power to start new business*

(See *supra* under caption "*Business by manager: Whether New or Old*")

(D) *Power to contract*

The manager has the power of making contracts, giving receipts and compromising or discharging claims ordinarily incidental to the family business.[66]

(E) *Power to contract debts*

Where a family business or profession is carried on and the family maintains itself by it, the manager thereof has an implied authority to contract debts for its purposes. The creditor in such a case is not bound to inquire into the purpose of the debt in order to bind the whole family because this power is necessary for the existence of the family.[67] The manager consequently can mortgage the family property for discharging debts of the business, which binds the joint family including its minor members.[68] He can also raise money needed

---

64. *Atmaram* v. *Sadhu Singh*, 40 Bom LR 742 (PC): AIR 1939 Mad 538.
65. *Shri Thakur Ram* v. *Ratan Chand*, (1931) 53 All 190 (PC); *Budhkaran Choukhani* v. *Thakur Prasad Shah*, ILR (1942) 1 Cal 19.
66. *Kishan Parshad* v. *Har Narain Singh*, (1910-11) 38 IA 45.
67. *Raghunathji Tarachand, A Firm* v. *Bank of Mumbai*, 34 Bom 72; *Champa* v. *Official Receiver*, 15 Lah 9.
68. *Shri Thakur Ram* v. *Ratan Chand*, (1931) 53 All 190 (PC).

to carry on the business. The sole decision, to raise money or not or to continue the business or to close it down rests with him. This power of the manager to alienate the joint family property for discharge of the family debts binds the interest of other coparceners only so long as the family continues to be joint in status. Once a severance in status takes place his right so to do comes to an end even though partition by metes and bounds has not taken place.[69]

(F) *Power to acknowledge debts*

The manager has the power to acknowledge a debt. However, he cannot relinquish a debt due to his family. He can make a part payment of a debt and thus extend the period of limitation but he cannot pass a promissory note or a bond so as to revive a time-barred debt. The burden of proof in this regard lies on him who alleges that the debt is time-barred — and a bond is given. The case of *Nagarmal*[70] supports this proposition.

(G) *Power to give a valid discharge*

The manager has full powers to give a valid discharge of all debts due to the family. This power is absolute and even when there are disputes due to differences of opinions in the family it can be exercised.[71] If one of the members in the family is a minor, he cannot have the benefit of Section 7 of the Limitation Act.[72] If the members of the family do not wish the Karta to represent the family their remedy is a suit for partition. The existence of a minor coparcener is no bar to a coparcener's right to claim his portion.

(H) *Power to refer to arbitration*

The manager may make a reference to arbitration of the dispute regarding joint family property provided it is for the benefit of the family and made bona fide, i.e. without fraud or collusion. The reference and the award therein is binding on all including minors. But if a minor, as represented by the manager as his guardian *ad litem*, is a party to the suit along with other members, the manager before entering into an agreement to refer the dispute to arbitration on the minor's behalf, must obtain the leave of the court as required by Order 32, Rule 7(1), Civil Procedure Code. In case no such leave is obtained the award is not void *ab initio*, but is voidable at the minor's option.[73]

(I) *Power to compromise*

A compromise in respect of a dispute made by a Karta bona fide and for the benefit of the family is binding on all members (including minors) of the family.[74] In the interests of a family a Karta can settle accounts with the debtor and may reduce reasonably either the interest or the principal amount, but he has

---

69. *Vardammal* v. *Ambalal*, AIR 1971 Mad 371.
70. *Nagarmal* v. *Bajranglal*, AIR 1950 PC 15.
71. *Jagan Nath* v. *Mannu Lal*, 45 Bom 446; *Babu Tatya* v. *Bala Ravji Desai*, 16 All 231; *Kanshi Ram* v. *Harnam Das*, ILR 1940 Lah 599; *Pannalal* v. *Gulam Haider*, 46 PLR 264.
72. *Ratiram* v. *Naidar*, 45 All 435.
73. *Ibid.*
74. *Babu Tatya* v. *Bala Ravji Desai*, 45 Bom 446.

no power to give up a debt due or to give up a valuable claim without any return or consideration.

The manager has a general power to represent the family and his bona fide acts bind the rest, but in case of a suit brought on behalf of the family, wherein other members are impleaded, if he makes a compromise with the defendant the consent of all other adult members would be necessary.[75]

(J) *Power to represent joint family in suits and other proceedings*

In a suit by or against a joint Hindu family, its manager or Karta fully represents the family and the other members are not necessary parties to the same.[76] Consequently the manager can sue in his own name and can be sued in respect of any transaction entered into by him as the manager of the family. A decree passed against him as representing the family, is binding upon all the members including the minor ones. Such a decree therefore operates as *res judicata* against all the members.[77]

In the case of a Hindu family, observes the Privy Council in *Lingangowda case*[78], where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again and each infant to wait till he comes of age and then bring an action or bring an action by his guardian before; and in each of these cases, therefore, the court looks to Explanation 6 of Section 11 of the Civil Procedure Code, to see whether or not the leading member of the family has been acting either on behalf of minors in their interest or, if they are majors, with their assent. Such consent will be implied if they do not come and apply for being made parties, but not if they so applied to contest the manager's action.[79] Thus, if a member of the joint family contends that what was done by the manager was beyond his power, such a person is not properly represented by the manager, and he must therefore be joined as a party to the suit.[80]

(K) *Power over income and expenditure*

The manager of a joint Hindu family has full control over the income and expenditure and he is the custodian of the surplus (savings) if any. So long as he spends the income for purposes of the family he is not under the same obligation to economise or save as a paid agent or trustee[81] would be. If he spends more than what the other coparceners approve, the remedy for the coparceners is to demand partition.[82] His powers to spend, one may say, are limited to family purposes which include expenses of management, realisation and protection of

---

75. *Bhairoolal* v. *Nana Ranchhod*, 1960 MPLJ 93.
76. *Hazarilal Hari Ram* v. *Nathmal Champalal*, 1961 Jab LJ 227.
77. *Shankarlingam* v. *T.N. Imam*, (1971) 2 MLJ 136; *Kishen Parshad* v. *Har Narain Singh*, (1910-11) 38 IA 45; *Sheo Shankar Ram* v. *Juddokunwar*, (1913-14) 41 IA 216: 36 All 383.
78. *Lingangowda* v. *Basangowda*, 54 IA 122: 54 Bom 450 PC: AIR 1927 PC 56.
79. *Ibid.*
80. See *Motilal* v. *Lal Chand*, ILR 1937 Nag 363: 172 IC 192: AIR 1937 Nag 121.
81. *Ramchandra* v. *Chinubhai*, AIR 1944 Bom 76.
82. *Simadri Subudhi* v. *Simadri Subodhi*, ILR 1960 Cut 604.

the family estate, residence, education, marriage, *shraddha* and religious ceremonies of the coparceners and their families.[83] He is liable to make good to the coparceners their shares of all sums which he has misappropriated or which he has spent for purposes other than those in which the family is interested. [*See* under Rights of coparceners — (*xiii*).] A manager cannot be charged with any gross negligence committed by him, unless it amounts to actual misappropriation.

(L) *Power of guardianship over the undivided interest of minor members*

Where a minor is a member of a joint family, the manager of the family is entitled to the management of the whole joint family property including the minor's interest therein. Under Section 12 of the Hindu Minority and Guardianship Act, 1956[84] no guardian is to be appointed for a minor's undivided interest in joint family property, because the property is under management of an adult member of the family, but a High Court can do so.

20. Manager's liability

We may enlist the following duties and liabilities of the manager of a Hindu joint family. They have been collected from different topics. Accordingly the liabilities are:

(*a*) Liability to render accounts.

(*b*) Liability to recover debts due to the family.

(*c*) Liability not to alienate coparcenary property.

(*d*) Liability not to start a new business without the consent of coparceners.

(*e*) Liability to spend reasonably.

(*a*) ***Liability to render accounts.***—As long as the family remains joint the manager is not supposed to keep accounts, however, if the nature of the dealings and the property involved is such that he must maintain accounts, he ought to do it. Under the Mitakshara law he is not liable to account for his past dealings with the property, unless there is clear proof of misappropriation or fraudulent use of family funds. But when partition takes place at that time he is liable to account for the family property as it exists. However the other coparceners are not bound to accept what he presents and the court in such cases would institute an inquiry at the instance of other members and discover the truth. The application of this principle depends upon the facts and circumstances of each case. The manager need not keep a separate account for each coparcener. If a coparcener is not satisfied with the situation his only remedy is to ask for partition. At this time the manager would render accounts on the basis of "what has actually been spent", and not on the basis of "what ought not to have been spent". The coparcener may show that the expenditure was not incurred which is shown or alleged to have been incurred or he may show that the manager has not disclosed some joint family properties which are the subject of partition.

---

83. *Narendra Nath Roy* v. *Abani Kumar Roy*, AIR 1938 Cal 78.
84. Act 32 of 1956.

However, in the following cases a member would be entitled to past accounts or dealings without asking for a partition:

(*i*) where the claimant has been excluded from the enjoyment of the property; or

(*ii*) where it is proved that the manager has misappropriated or fraudulently converted the family estate; or

(*iii*) where the management was grossly negligent and prejudicial to the interests of the claimant during his minority; or

(*iv*) where there was some previous agreement to enjoy the family property in specific shares and that arrangement has been disturbed; or

(*v*) where there is a special agreement between the coparceners and the manager for the manager's liability to account.

(*vi*) where a division of status is effected, but the actual partition by metes and bounds is effected afterwards. Here the manager is liable to account for the intervening period also.

In Bengal where the Dayabhaga system prevails, a coparcener without filing a partition suit may call upon the manager to account for past dealings and income of the family property. The court may compel the manager to do so, if he refuses.[85]

(*b*) ***Liability to recover debts due to the family***.—A Karta or manager should realise all the debts due to the family. As has been said before, the manager has no power to let go or give up a debt or a valuable claim due to the family without any consideration for the same. Of course he can make a reasonable reduction in the interest due or in the principal amount due to the family.

(*c*) ***Liability not to alienate coparcenary property***.—As discussed before, unless it is for the benefit of the family estate or for legal necessity a manager cannot alienate joint family property without the consent of all the coparceners.

(*d*) ***Liability not to start a new business without the consent of coparceners***.—Unless the adult members of a family expressly or impliedly consent, a manager cannot impose a risk of a new business upon them. Similarly, he cannot impose the risk of a new business upon minor members, even if he is a father. This is discussed before.

(*e*) ***Liability to spend reasonably***.—As a Karta of a joint Hindu family has control over the income and expenditure of the family, he is the custodian of the surplus income. He should however spend family funds reasonably and for the purpose of the family only. At this juncture one should remember that his duty is to spend reasonably and not economically. Like a trustee or an agent he is under no duty to economise or to save. If a coparcener thinks that the manager is

---

85. *Abhaya Chandra* v. *Pyare Mohan*, 5 Beng LR 347.

not frugal, sober or within compass in spending, his remedy is to ask for partition (see *supra*).

21. Alienation of coparcenary property

(*a*) ***Modes of.***—Alienation of property may be voluntary or involuntary.

Voluntary alienation of property may be made in three ways:

(*a*) alienation for consideration, which may take form of sale, mortgage, lease or exchange.

(*b*) alienation without consideration i.e. by gift.

(*c*) alienation by preparing a will.

Involuntary alienation takes place when a person's property is attached. Joint family property or the undivided interest of a coparcener in such property may also be attached in this way.

It must be remembered that right of alienation of joint family property is not unrestricted like alienation of one's separate property. One's right to alienate the joint family property is determined by his status in the joint family.

(*b*) ***Purpose.***—According to Vijnaneshwar the joint family property may be alienated for the following purposes:

(*i*) in times of distress or necessity;

(*ii*) for purposes of family; and

(*iii*) for religious purposes like *Sraddha*, *Upanayan*, marriage, etc.

All the above modes of mutation are included in "legal necessity", "benefit of the estate" and "for indispensable duty".

(*c*) ***Who can alienate.***—Alienation can be made by the following:

(*i*) when other members are major —

by the whole body of coparceners (even without necessity).

(*ii*) when other members are minors —

by the manager or Karta of the family for (*a*) legal necessity; or (*b*) for the benefit of the estate.

(*iii*) by the father by an act *inter vivos*, but not by a will.

(*iv*) by the sole surviving coparcener.

No other coparcener can alienate coparcenary property unless and until he is so authorised.

(*d*) ***Alienation by the whole body of coparceners.***—It is very simple to understand that when all the coparceners are adults,[86] that whole body can alienate the coparcenary property for any purpose and even without there being any necessity. It follows, therefore, that when the manager alienates the joint family property with the consent of all the coparceners, all being adults, the

86. *Mahabir Prasad* v. *Ramyad Singh*, (1874) 12 Beng LR 90: 20 WR 192.

alienation, though not for legal necessity, is valid and would pass a good title to the transferee.

If such an alienation is made without the consent of all the coparceners, it would bind the shares of the consenting coparceners if such a case arose in Tamil Nadu, Maharashtra, or Gujarat. It should be noted that in West Bengal and U.P. it would not bind the share of the person alienating or of the other consenting coparceners.

(*e*) ***Alienation by the manager or karta of the family***.—The manager of a Hindu joint family can alienate the joint family property even without the consent of all the coparceners, if such alienation is made for —

(*a*) legal necessity[87], or

(*b*) for the benefit of the estate[88].

This position has been discussed before.

Legal Necessities: Illustrations

(*i*) The thread ceremony of the members of the family (यज्ञोपवीत संस्कार).

(*ii*) *Sraddha* (श्राद्ध) of the deceased members of the family.

(*iii*) The Payment of government loans and taxes[89], e.g. income tax.[90]

(*iv*) Repayment of loan raised for family business.[91]

(*v*) The funeral ceremony of a member of family.[92]

(*vi*) Defence of any member of the family from a criminal charge.[93]

(*vii*) Defence of the status of a member of the family in litigation.

(*viii*) The marriage expenses of the male members of the coparcenary. However if the marriage is prohibited by law its expenses are not considered for legal necessity. For example

(*a*) The marriage of a minor,

(*b*) Second marriage of a member when his wife has expired.[94]

Note.—The second marriage of a widower is not illegal, it is submitted. Depending upon circumstances, it may be unreasonable rather it may be necessary. Hence the second marriage of a widower may be treated as legal necessity.[95]

---

87. *Rani* v. *Santa Bala Debnath*, (1970) 3 SCC 722, 725: AIR 1971 SC 1028; *Ram Sumran* v. *Shyama Kumari*, (1922) 49 IA 342, 346.
88. *Daulat Ram* v. *Mehar Chand*, (1887) 14 IA 187: (1888) 15 Cal 70; *Kamalbir Singh* v. *Jagir Singh*, (2006) 1 HLR 582.
89. *Garibullah* v. *Khadak Singh*, (1903) IA 165: ILR (1903) 25 All 407: 5 Bom LR 478: 8 Sar 483.
90. *Mukesh Kumar* v. *Col. Harbans Waraich*, (1999) 9 SCC 380.
91. *Niamat Rai* v. *Din Dayal*, AIR 1927 PC 121: 51 IA 211: 101 IC 373.
92. *Sheonath Sahu* v. *Munni Devi*, AIR 1928 All 1 (NOC).
93. *Said Ahmed* v. *Raja Barkhandi Mahesh Pratab Narain Singh*, AIR 1932 Oudh 255: 9 Oudh WN 253: 139 IC 64.
94. *Patell Thimma Reddi* v. *Lakireddigari Chinna Ranga Reddi*, ILR 1947 Mad 379: AIR 1947 Mad 65: (1946) 2 Mad LJ 213.
95. *Modern Hindu Law*, Chap. 8, p. 691.

(*ix*) The maintenance of all the members of the joint family is a legal necessity. Maintenance, here has the same wide meaning as has been given to it under Section 3(*b*) of the HAMA.[1]

It includes in all cases

(*a*) The provision for food, clothing, residence, education and medical attendance and treatment, and

(*b*) in the case of an unmarried daughter, the reasonable expenses of and incidental to her marriage.

(*c*) The expenses for the marriage of the daughter's daughter whose father is not indigent, it has been held, are not for legal necessity of the family.[2]

Legal necessity may change its content with the passage of time.[3]

For the benefit of the estate: *Illustrations*:

If the alienation is for the "benefit of the estate" of the family, it is justified. This term was used in *Hanoomannershad case*[4] by the Privy Council, but it was not explained therein. In *Palaniappu case*[5] it was observed that the expression cannot be precisely defined, but it includes the preservation of the estate from extinction, its defence against hostile litigation, its protection from innundation and similar circumstances.

The Supreme Court of India in *Balmukund* v. *Kamla Wati*,[6] resolved this problem by explaining it and said that the transaction which is for the benefit of the family need not necessarily be only of a defensive character. In this case the manager of the family found it difficult to manage the property in issue and the family was therefore incurring losses. The court said that to sell such property on advantageous terms and then to invest the sale proceeds in a profitable way, would certainly be regarded as beneficial to the family. This view was reiterated thereafter by the Supreme Court.[7] Haryana High Court has used the expression "act of good management" in place of "benefit of the estate".[8]

The following are the acts of good management for the benefit of the estate.

(*a*) Acquisition of tenancy rights.[9]

---

1. *Modern Hindu Law*, Chap. 8, p. 691. See the Section, *ante*.
2. *Malik Mohammad Ibrahim* v. *Harakh Singh*, ILR (1947) 26 Pat 430: AIR 1948 Pat 257.
3. *Jagdish Parshad* v. *Laxmi Narain*, (2004) 1 HLR 35 (P&H).
4. *Hanoomannershad Pandey* v. *Musammat Babooee Moonraj Koonweree*, (1854-57) 6 MIA 393: 1 Sar 552.
5. *Palamiappu Chetty* v. *Deivasi Kamony Pandara*, (1917) 44 IA 147: AIR 1917 PC 33: 39 IC 722.
6. AIR 1964 SC 1385: (1964) 6 SCR 321.
7. *Murarka Properties (P) Ltd.* v. *Beharilal Muraka*, (1978) 1 SCC 109: AIR 1978 SC 300; *Prasad* v. *Govindswami Mudaliar*, (1982) 1 SCC 185: AIR 1982 SC 84; *A. Basavraj* v. *Khushal Chand*, (1992) 2 HLR 300 (Kant DB); *Jagat Narain* v. *Mathura Das*, AIR 1928 All 454: ILR (1928) 50 All 969: 26 All LJ 841.
8. *Jagdish Parshad* v. *Laxmi Narain*, (2004) 1 HLR 35 (P&H).
9. *Balagowda Alagowda Patil* v. *Balasaheb*, (1999) 1 HLR 227 (Kant).

(*b*) Borrowing of money for purchasing a tractor,[10]

(*c*) Borrowing of money for maintaining family,[11]

(*d*) Borrowing of money for improving the property,[12]

(*e*) Mortgage of a house for raising money required for improvements in the family house.[13]

(*f*) Mortgage of property for money at a less rate of interest for the purpose of repaying a debt at a higher rate.[14]

(*g*) Selling small part of land for reclamation and cultivation.[15]

(*h*) Mortgage of property to raise funds for reconstruction and renovation of the business sites e.g. a hotel or shop.[16]

(*i*) Sale of property distantly situated and purchasing nearby property in lieu thereof for easy cultivation.[17]

(*j*) Sale of land for construction of a pucca house in the place of a house with a roof of foos.[18]

(*k*) Sale of a house in a dilapidated condition, which the Municipal Committee wanted to pull down.[19]

(*l*) Sale of a family house old & in tattered condition in a small city for raising funds for constructing another house in a big city for family.[20]

It has to be remembered that the burden of proving legal necessity or benefit of estate lies not on the alienor; it lies on the coparcener who impugns the alienation.[21]

(*f*) ***Alienation by the father***.—A Hindu father, it must be remembered, has special powers of alienating coparcenary property. No other coparcener enjoys such powers. The father cannot alienate the property for inadequate consideration.[22] He can alienate by an act *inter vivos*, but not by a will. The purposes for which he can do so may be:

(*i*) legal necessity;

---

10. *Gourawwa* v. *Basappa*, (2003) 2 HLR 488 (Kant).
11. *Ibid*.
12. *Ibid*
13. *Ratnam* v. *Govindrajulu*, ILR (1878-80) 2 Mad 339: 3 Ind Jur 202.
14. *Ibid*.
15. *Sarda Ram* v. *Nakli Singh*, (1989) Supp (2) SCC 620.
16. *Gollamudi Siva Kumari* v. *Indian Overseas Bank*, AIR 1978 AP 37: (1977) 2 Andh WR 523: 1978 HLR 367.
17. *Jado Singh* v. *Natthu Singh*, AIR 1926 All 511: ILR (1926) 48 All 592: 24 All LJ 633.
18. *Tarni Prasad* v. *Basudeo*, AIR 1981 Pat 331: 1981 BLJ 252: 1981 BLJR 346.
19. *Nagindas Maneklal* v. *Mahomed Yusuf Mitchella*, AIR 1922 Bom 122: ILR (1922) 46 Bom 312: 23 Bom LR 1094.
20. *A.C. Kapoor* v. *Radhika Devi*, (1981) 4 SCC 487: AIR 1981 SC 2128 (wrongly treated as a case of legal necessity).
21. *Hanomannershad Pandey* v. *Mst. Babooee*, (1854-57) 6 MIA 393: 1 Sar 552; See also *Rani* v. *Santa Bala Debnath*, (1970) 3 SCC 722: AIR 1971 SC 1028; *Sonappa Iyer* v. *K.R. Ramathaimmal*, (1994) 1 HLR 469 (Mad DB).
22. *Prasad* v. *Govindswami Mudaliar*, (1982) 1 SCC 185: AIR 1982 SC 84.

(*ii*) benefit of the estate;

(*iii*) discharge of antecedent debts, not incurred by him for illegal or immoral purposes;

(*iv*) a gift (for example a gift made to one's wife, daughter, son) of ancestral movable property for the purpose of indispensable acts of duty made "through affection" within reasonable limits;

(*v*) a gift for "pious purpose" of ancestral immovable property within reasonable limits.

All these heads have been discussed before.

(*g*) ***Alienation by the sole surviving coparcener.***—Being a sole surviving coparcener for the time being, he can dispose of the entire property as if it were his separate property.[23] He is not required to see whether there is any legal necessity. He may make a gift or a mortgage as he wishes but he should not dispose of the property by will because a will would be operative from the date of the death of a testator and before the testator dies, if a coparcener comes into existence, the will would not take effect. Consequently the property will pass by survivorship.

Barring the case of disposal by a will, disposal in any other way would be alright and the subsequent birth of a son to him cannot invalidate the alienation.

22. Alienation of undivided coparcenary interest

Alienation by a coparcener of his undivided share can be viewed from two angles, one — *voluntary alienation* or *private alienation,* and two — *alienation in execution of a decree.*

Voluntary alienation may include (*i*) sale or mortgage, (*ii*) gift, and (*iii*) will.

(*a*) ***Sale or mortgage.***—Under the Mitakshara law as administered in the States of Tamil Nadu, Madhya Pradesh, Maharashtra and Gujarat, a coparcener can sell, mortgage or otherwise alienate for value his undivided interest in the coparcenary property and this can be done without the consent of other coparceners. However in the States of West Bengal, Bihar, Orissa, Punjab and U.P. (according to the Mitakshara law as administered there) no alienation by a coparcener of his undivided interest can be made even for value without the consent of the other coparceners,[24] unless it is for legal necessity or for payment of antecedent debts incurred by the father. When an alienation is to be made in favour of a coparcener of the same family, consent of other coparceners is a must.[25] An alienation not supported on the above grounds is not void *ab initio* or unlawful but is voidable at the option of the other coparceners as they are affected by the unauthorised act of the alienator.[26]

---

23. *N. Jayalakshmi Ammal* v. *R. Gopala Pathar*, 1995 Supp (1) SCC 27.
24. *Ralia Ram* v. *Atma Ram*, 14 Lah 584.
25. *Chandar* v. *Dampat*, (1894) 16 All 369.
26. *Hanuman Kamut* v. *Hanuman Mandar*, 19 Cal 123 (PC).

(*b*) *Gift.*— Insofar as alienation by means of a gift by a coparcener is concerned, he cannot make a gift except with the consent of the other coparceners. In *Gundayya case*[27], a Hindu coparcenary consisted of two members only. One of them can, with mutual concurrence of the other, gift his share in the undivided property to the other. If the gift is made without the consent of other coparceners it is altogether void and consequently the donor can recover the same.

(*c*) *Will.*—Prior to 1956, i.e. before coming into force of the Hindu Succession Act, 1956, a Hindu could not alienate or dispose of his coparcenary interest by making a Will. This was so because a will speaks from the deathbed of its author and on the death of a Hindu coparcener his undivided share vests in the remaining coparceners by survivorship, consequently leaving nothing on which a Will can operate.[28] But now under this Act[29] a coparcener can dispose of his interest by a will or by any other testamentary disposition (discussed before; see *supra*).

Execution of a decree

Under the Mitakshara law, as administered in all the States of India, the undivided interest of a coparcener can be attached in his lifetime in execution of a decree against him for his separate debts.[30] Once such interest is attached in the lifetime of the coparcener, it may be sold even after the coparcener's death.[31]

It must be noted that sale of a coparcener's interest does not affect his status as a coparcener; he retains his right to take by survivorship the interest of a deceased coparcener.

23. Rights and remedies of purchaser of undivided coparcenary interest

The purchaser of an undivided interest of a coparcener in one or all of the joint family properties, either by a private sale or in execution of a decree, has the following rights and remedies:

(1) Right of joint possession;

(2) Right to partition;

(3) Right to share on partition;

(4) Right to mesne profits;

(5) Right to sue for partition after the death of the vendor;

(6) Equitable right on partition;

(7) Right to sue for specific performance;

---

27. *Gundayya Hanmant Naik* v. *Shriniwas Narayan Naik*, (1936) 38 Bom LR 1095.
28. *Laxmi Chand* v. *Anandi*, 53 IA 123.
29. Hindu Succession Act, 1956, S. 30.
30. *Deen Dayal* v. *Jagdeep*, 4 IA 247.
31. *Suraj Kaur* v. *Sheo Prasad*, 6 IA 88.

(8) Right to impeach previous alienations;

(9) Right to take, subject to equities.

At the outset we should note that at a court sale in West Bengal and U.P. or at a court sale or a private sale in Tamil Nadu, the purchaser does not acquire a right to joint possession with other coparceners.[32] He gets merely a right to compel a partition of such property.[33] However in Mumbai the court may at its discretion allow joint possession to the purchaser who has acquired the property for consideration.

Partition may be of two kinds:

(*i*) general partition pertaining to the whole joint family property, and

(*ii*) specific partition wherein the partition of the specific property sold is demanded.

Insofar as general partition is concerned the law is settled that a purchaser has the right to sue for it, but as to specific partition, opinions of High Courts differ; the Allahabad and Calcutta High Courts holding that specific partition is permissible while the Mumbai and Chennai High Courts holding that it is not permissible.

If the purchaser of a coparcener's interest is not a relative but a stranger and he has not obtained possession he would not be given joint possession. He would be left to his remedy of a suit for general partition.

The purchaser of a coparcener's interest need not sue for partition in the lifetime of the vendor coparcener, he can do so even after the vendor's death.[34] In other words the purchaser's right to sue for partition is not lost by the death of the coparcener.

The purchaser does not acquire a right to be considered as a member of the joint family in place of the vendor, or a right to have joint possession of the family property in place of the vendor. Similarly he does not acquire any right to possession of any specific part of the property, that being a right which the vendor himself did not have. His only right is to sue for partition and claim the share which would have gone to his vendor.[35]

The alienee of a specific property or of the undivided interest of a coparcener, on general partition, has an equitable right to have that property assigned to him, if that could be done without doing any injustice to the other coparceners. However it must be noted that the alienee takes the interest subject to all the charges, incumbrances and liabilities affecting it at the time. In other words if any liabilities attach to the transferor's share the alienee can recover from the transferor property of an equivalent value from other properties allotted to him as his share on partition.[36]

---

32. *Sethu Ramalinga* v. *Veeraswami*, AIR 1971 Mad 174: (1971) 1 Mad LJ 329.
33. *Suraj Bansi Koer* v. *Sheo Persad*, (1880) 5 Cal 148 PC.
34. *Venkatrama* v. *Meera*, 25 Mad 690.
35. *Bai Savantibai* v. *Janardan R. Warik*, 41 BLR 631.
36. *Vasudeo Dagadulal* v. *Kankoochand Hirachand*, AIR 1951 Bom 226.

Regarding claim for mesne profits the purchaser is not entitled to it between the date of the purchase and the date of the suit for partition. To be more explicit, the share to which he is entitled is the interest to which the alienor was entitled at the date of alienation and not the interest as varied by subsequent births or deaths in that family at the time when he seeks his remedy.[37] Where there is partition of a family without a division of property by metes and bounds the purchaser of the undivided share of one of the members of the family is entitled to claim mesne profits from the members in possession of such property.[38]

In case where an alienor coparcener dies before completing the sale, the purchaser's right to enforce specific performance of the contract of sale is not affected.

Where a purchaser purchases the entire interest of the whole family coparcenary property, he is entitled to challenge or impeach the previous alienation in respect of such property. As succinctly put by the Allahabad High Court,[39] for the purpose of protecting or defining the property or interest acquired by him, the transferee acquires the right of the coparcener to call in question a previous alienation made by the manager of the family other than for legal necessity.

The same principles apply in the case of a mortgagee from a coparcener.[40]

24. Insolvency of coparcener: Effect of

A joint Hindu family as such cannot be adjudged insolvent but its individual member, or two or more members of such family, may be adjudged insolvents.[41] The effect of insolvency can be examined from three different angles, for example:

(*i*) insolvency of the manager of such family, where he is not the father of other coparceners;

(*ii*) insolvency of the father; and

(*iii*) insolvency of other coparceners.

In case where the manager of such family (he not being the father of other coparceners) becomes insolvent, his separate property and his undivided interest in the joint family property vests in the Official Assignee or Official Receiver, as the case may be. The manager has the power to sell or mortgage the interests of other coparceners for satisfying joint family debts.

This power vests in the Official Assignee under Section 52(2) of the Presidency Towns Insolvency Act, while there is no corresponding provision

---

37. *Naro Gopal Kulkarni* v. *Paragauda*, 41 Bom 347; *Majeti Kasi Viswesra Rao* v. *Pulletikurti Varahanarasimham*, AIR 1937 Mad 631.
38. *Sivamurthy* v. *Venkayya*, 57 Mad 667: AIR 1934 Mad 364.
39. *Madan Lal* v. *Gajendrapal Singh*, AIR 1929 All 243; *Alla Venkataramanna* v. *Palacheria Mangamma*, AIR 1944 Mad 457, 458.
40. *Moti Meghaji Marwari* v. *S. Amarchand Rajaram Marwari*, 35 Bom LR 132.
41. *Mahabir Prasad Poddar* v. *Ram Tahal Mandar*, 16 Pat 724.

under the Provincial Insolvency Act in this regard. Consequently such power does not vest in the Official Receiver under the latter Act.

A minor member of a joint family firm cannot as such be adjudged insolvent. The filing of an insolvency application by a coparcener or by his creditor does not bring about a severance of the joint family status. Similarly adjudication of a coparcener as an insolvent does not bring about a severance in the joint family status.[42]

In case where the manager of a joint Hindu family is a father, considerations different from the above apply. The Nagpur High Court[43] in this regard observed that a Hindu father has power to sell the interests of his sons in the joint family property for discharging family debts and his antecedent debts, not tainted with illegality or immorality. And this power of the father vests in the Receiver appointed by the court and the court or Receiver can sell such interests. This, however, does not mean that a son's share as such vests in the Official Assignee or Receiver. The Official Assignee or Receiver stands in the shoes of the father and consequently he does not have larger powers than what the father has. In short, what the father could not do, the Official Assignee or Receiver cannot do.

In case of insolvency of other coparceners their separate property and their interest in the joint family property both vest in the Official Assignee or Receiver for the benefit of his personal creditors. In such a case the creditors of the insolvent member's father, do not have any priority over creditors of the insolvent himself.

25. Who may object to alienations

As a general rule unauthorised alienations, i.e. alienations without legal necessity or made not for the benefit of the estate of coparcenary property, are liable to be challenged and objected to.

(*a*) ***Persons who may object.***—The following persons may object to and impeach an unauthorised alienation:

(*a*) Every coparcener other than the alienor, provided (*a*) he exists (i.e. born or begotten) at the date of alienation; and (*b*) is not otherwise disqualified;

(*b*) a person succeeding to the joint family property as heir of the sole surviving coparcener;

(*c*) a subsequent transferee of the whole of the property;

(*d*) a purchaser at a sale in execution of a decree against the property;

(*e*) a person holding title by adverse possession to the whole of the property; and

(*f*) a creditor.

---

42. *Venkatarayudu* v. *Sivaramakrishnayya*, 53 Mad 126; *Jagdish Pandey* v. *Rameshwar Chaubey*, AIR 1960 Pat 54.

43. *Wasudeo* v. *Devidas*, AIR 1948 Nag 215.

Alienation by a coparcener in excess of his powers may be set aside by another coparcener who was in existence at the time when the same was completed and did not assent to it. A person in a womb, for this purpose is regarded as an existing person.[44] That is, a coparcener who was in existence at the time of the completion of the alienation or who was born subsequent to the date of alienation (being in his mother's womb at the date of such alienation) has got similar rights.[45] The simple logic behind this rule seems to be that a son who is conceived is as good as a son who is born. This right, it must be noted, is not a right personal to him. It is a right which he exercises on behalf of the family and for its benefit.

Alienation made by a sole surviving coparcener even without legal necessity is valid. And it cannot be objected to by a son who was neither conceived nor born at the date of alienation.[46] But when a father, with his sons living, makes alienation which is neither for legal necessity, nor for payment of an antecedent debt, it may be set aside if it is made without their consent. It would be set aside partially (i.e. insofar as his interest is concerned) in Mumbai, Chennai and the Central Provinces but it would be set aside wholly in Bengal and U.P.

If all sons, living at the time of alienation, die before their father dies, and no other son is born before the death of the last of such sons, the father remains the sole surviving coparcener for the time being. The afterborn sons in such a case cannot impeach the alienation made by their father. Now, when the sons are alive and, during their lifetime, alienation is made by the father and another son is born, he can challenge the alienation unless the same is ratified by the sons who existed before his birth or their cause of action has been barred by limitation.[47] The Privy Council have approved this rule in *Sri Udasi Nirwani case*[48]. This view is accepted by the Mumbai High Court in *Shivaji Ganpati case*[49].

(*b*) ***Doctrine of overlapping***[50].—In order that an afterborn son should have a right to challenge the alienation, he must be born when there exists some coparcener in the family, who has a right to challenge the alienation in question. Putting it another way there must be no gap between two coparceners, that is the existing coparcener having a right to challenge and the birth of a son (new coparcener) who enters the coparcenary subsequently. Consequently, the two lives, namely the life of the son who has the right to challenge and the life of the

---

44. *Ponnambala Pillai* v. *Sundarappayyar*, 20 Mad 354; *Deo Narain Singh* v. *Ganga Singh*, 37 All 162; *Brij Jiwandas* v. *Kawal Mani Bibi*, AIR 1942 All 444.
45. *Bholanath Khettry* v. *Kartick Kissen Das*, 34 Cal 372.
46. *Lal Bahadur* v. *Ambika Prasad*, 47 All 995: AIR 1925 PC 26.
47. *Bhup Kunwar* v. *Balbir Sahai*, 44 All 190; *Dwarka Das* v. *Krishan Kishore*, 2 Lah 114; *Ranodip Singh* v. *Parmeshwar Prasad*, 47 All 165 (PC); *Bhagwat Prasad* v. *Debichand Dogra*, 20 Pat 727.
48. *Udasi Nirwani* v. *Surajpal Singh*, (1944) 47 Bom LR 599 (PC).
49. *Shivaji Ganpati* v. *Murlidhar*, (1954) 56 Bom LR 426.
50. M.D. Manek: *Handbook of Hindu Law*, 8th Edn., p. 188.

subsequently-born son must overlap. That is the doctrine of overlapping which the Privy Council considered in *Sri Udasi Nirwani case*[51]. This is explained in *Shivaji Ganpati case*[52].

(*c*) ***Right of impeachment when lost.***—The right of impeaching the alienation is lost —

(*i*) if the coparcener consents to it; or

(*ii*) if he dies; or

(*iii*) if he is given in adoption; or

(*iv*) by lapse of statutory period of limitation for the suit.

When an unjustifiable alienation is set aside and the transferee is dispossessed, he is entitled to sums paid by him towards mortgages binding on the estate. He is also entitled to compensation for reasonable improvements made to the estate by him.[53]

(*d*) ***Limitation.***—Limitation for setting aside an alienation made by a father is 12 years from the date when the purchaser or the alienee takes possession of the property. If the alienee has not taken possession of the property the son has only the right to request for a declaration from the court to the effect that the deed of transfer is invalid. The limitation period in such a case is 6 years. The subsequent birth of a son does not create a fresh cause of action; it is not a fresh or new starting point of limitation.[54] It must however be noted that as explained by the Allahabad High Court the bar of limitation against an elder son does not operate as a bar against his younger brother who existed at the date of alienation. This is so because a minor brother can claim the benefit of his minority for extension of the period of limitation.

(*e*) ***Shivaji Ganpati* v. *Murlidhar***[55].—In this case the facts are that one *G* and his son *M* formed a joint Hindu family. In 1936 *G* disposed of certain family properties without the consent of *M*. Alienation made was not for purposes of legal necessity nor was it for satisfying the antecedent debts due by *G*. Between the years 1936 and 1942, three more sons (who were plaintiffs in the case) were born to *G*. In 1942 *M* was given in adoption in another family. In 1947 the plaintiffs (three afterborn sons) filed a suit for setting aside the alienation effected by *G*.

On the question whether the plaintiffs, who were not born at the time of alienation, were entitled to institute a suit and to claim that the alienation effected by *G* insofar as it purported to convey to the transferee his interest exceeding his half-share in the properties at the date of the alienation was liable

---

51. *Udasi Nirwani* v. *Surajpal Singh*, (1944) 47 Bom LR 599 (PC).
52. *Supra* n. 86.
53. *Madhav Rao Ganpat Pagire* v. *Shankar Hari Bhagwat*, 45 Bom LR 462.
54. *Ranodip Singh* v. *Parmeshwar Prasad*, 47 All 165 (PC); *Gujarat Oil Mills & Mfg. Co. Ltd.* v. *Shankarobhai Motilal*, 45 Bom LR 507.
55. (1954) 56 Bom LR 426.

to be set aside, at their instance, on the ground that it was unauthorised, the court held the following:

> "As the right which *M* had to challenge the alienation, was subsisting in *M* when the plaintiffs were born, the right which *M* had, could be availed of as effectively by the plaintiffs as *M* himself, and, therefore, the plaintiffs had the right to challenge the alienation. The period of limitation for the suit to challenge the alienation was 12 years."[56]

B. DAYABHAGA LAW

26. Dayabhaga joint family

The concept of a joint family under the Dayabhaga law is quite different and distinct from that under the Mitakshara law. The following are the principal points of difference or the distinguishing features between the two systems in this branch of law. One must note that where the Dayabhaga law is silent on a particular point, the rules of the Mitakshara law would be applied so far as they are applicable.[57]

(*a*) ***Essence of coparcenary property***.—Under the Dayabhaga law, the essence of coparcenary is the unity of possession, while under the Mitakshara law it is unity of ownership.[58] There is no unity of ownership under the former because the ownership is not in the whole body of coparceners. Consequently every coparcener takes a defined share and he is its absolute owner having independent rights of disposition even by gift or will as if it is his separate property.[59] His share is not fluctuating or changing by births and deaths in the family. One should remember therefore that the only sense in which the word coparcenary is used here is that the persons (coparceners) jointly possess the family property.

(*b*) ***Foundation of the coparcenary***.—As observed earlier, the foundation of a coparcenary is the acquisition of interest in coparcenary property and in Mitakshara law the foundation is first laid on the birth of a son in the family. In the case of the Dayabhaga system the foundation of coparcenary is laid not by birth of a male issue but by the death of the previous owner. As long as the father is alive there is no coparcenary between the father and his male issues.[60] It is only when he dies leaving two or more male issues that the coparcenary first comes into existence. Thus a son does not acquire any interest by birth. The sons become entitled to the ancestral property, as in the case of separate property, by death of their father.

(*c*) ***Passing of property***.—Under the Mitakshara law the share of the deceased coparcener's property passes by survivorship to other coparceners

---

56. *Shivaji Ganpati* v. *Murlidhar*, (1954) 56 Bom LR 426.
57. *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, (1868) 12 MIA 397.
58. *Bageshwari Prasad Dvivedi* v. *Deopati Kuer*, AIR 1961 Pat 416.
59. *Ibid*.
60. Mulla's *Principles of Hindu Law*, 10th Edn., S. 277, p. 338.

while under the Dayabhaga law since every coparcener takes a defined share in the coparcenary property, on his death, his share will pass to his heirs.

(*d*) ***Members of coparcenary***.—Under the Mitakshara law a coparcenary consists of male members only, while under the Dayabhaga law it consists of males and females both. However, one important point may be noted that while under the Mitakshara law no female Hindu can become a coparcener, under the Dayabhaga law a coparcenary cannot begin with females. Consequently, if a Hindu governed by the Dayabhaga system of law dies leaving two or more daughters, the daughters would not form a coparcenary. A female coparcener can sue for partition.[61]

The Hindu Succession Act, 1956 does not disrupt the Dayabhaga joint family. The only change is that the share of a coparcener will devolve by succession upon the heirs as per the provisions of the Act. This can be explained by the following illustrations:

(*1*) *X* dies leaving three sons. All these three sons will form a coparcenary succeeding to their father *X*.

(2) *O* dies, leaving a son *P*. *P* has two sons *Q* and *R*. Here son *P* will not form a coparcenary with the grandsons *Q* and *R*. *P* only will succeed to the separate or ancestral property left by *O* wherein *Q* and *R* do not get any interest by birth. However when *P* dies *Q* and *R* will together succeed to such property and will form a coparcenary under the Dayabhaga law.

(*e*) ***Concept of ancestral property***.—Under the Mitakshara law and under the Dayabhaga law the ancestral property consists of property inherited from the father, father's father and father's father's father. However the distinguishing feature of the Dayabhaga system is that the male issues of a Hindu do not acquire any interest by birth which they do under the Mitakshara system.

(*f*) ***Son's interest***.—The sons under the Mitakshara system get an equal interest in the coparcenary by birth while under the Dayabhaga system rights of the sons arise for the first time on the death of the father. Even on his death they take the property of the father, whether separate or ancestral, as heirs and not by survivorship.

(*g*) ***Power of father***.—As seen above under the Dayabhaga system, since the sons do not acquire any interest by birth, the father's power to dispose of the property whether movable or immovable either by sale, gift or will or otherwise is absolute. Under the Mitakshara system this power to dispose of ancestral property is limited. Prior to 1956 a male Hindu coparcener could not dispose of ancestral property by will under the Mitakshara law but now under the Hindu Succession Act, 1956, he can do so. The same right is now recognised under the Dayabhaga system by the Act.

---

61. *Ranada Kishore Roy* v. *Swarnamoyee Debi*, AIR 1940 Cal 33.

(*h*) ***Partition and accounts***.—Under the Dayabhaga law, the sons have no right to demand partition of ancestral property from the father which they could do under the Mitakshara law.

Similarly in the former, sons could not call for accounts of the management from the father who was the absolute owner of all the property, while under the latter sons could do so.

(*i*) ***Coparcenary property***.—Coparcenary property under both the systems of law consists of ancestral property, of joint acquisition, of property thrown into the common stock or of property representing accretions to such property. In spite of this similarity, under the Dayabhaga system every coparcener takes a definite share therein like his separate property and it passes by succession to his heirs and not by survivorship to the remaining coparceners. Under the Mitakshara law a coparcener's share fluctuates and on his death it passes to the remaining coparceners by survivorship.

(*j*) ***Power of coparcener***.—Under the Dayabhaga system since every coparcener takes a defined share, he can dispose it of by sale, will or gift or otherwise in any manner, like his separate property. This is not so under the Mitakshara Law.

(*k*) ***Enjoyment of property***.—From the above it follows that the Dayabhaga coparcener can make any use of his property he likes. He can even lease out his share and put the lessee in possession, while under the Mitakshara Law this is not possible.

(*l*) ***Presumption***.—Presumptions regarding joint family and joint family property under both the systems are the same. The only point of difference is that under the Dayabhaga law there is no presumption that property purchased by a son in his name during his father's lifetime, and which is in the son's possession ever since the purchase, is joint family property. The burden of proof in this regard lies on him who denies the son's ownership.

(*m*) ***Prevalence***.—The Dayabhaga system prevails in Bengal and in Assam while the Mitakshara system prevails in other parts of India.

———

Chapter IV
Debts

SYNOPSIS

A. Grounds of liability
B. Debts under Mitakshara law
   1. Heir's liability
   2. Liability for coparcener's debts
   3. Liability of a son including grandsons and great-grandsons to pay the father's debts
      (*a*) Liability after partition
      (*b*) Liability for debts incurred before partition
   4. Doctrine of pious obligation of a Hindu son to pay his father's debts
      (*a*) Meaning
      (*b*) Origin and basis
      (*c*) Reasons for liability
      (*d*) Nature of liability
      Hemraj case (1943)
      Debts which a son is not obliged to discharge
      Debts judicially held to be avyavaharika
   5. Father's right to alienate coparcenary property: Nature of
   6. What is an antecedent debt?
   7. Time-barred debts
   8. What is an illegal or immoral debt?
   9. Suretyship of father: Son's liability
   10. Enforcement of liability after partition
C. Debts under the Dayabhaga law
D. Abolition of Pious Obligation

A religious duty exists in case of a son, grandson and great-grandson. A *father* is not under a religious obligation to pay his son's debts unless the son has left his self-acquired property to him.[1] A *husband* is not liable for his wife's debts unless the debts are contracted by the wife under his express authority or under such pressing circumstances wherefrom his implied authority could be inferred. A husband may well ratify her transactions effected without his previous authority or when the wife is entrusted with the management of his business.

Similarly, a *widow* is not bound to pay the debts of her husband unless she has succeeded as his heir or has promised to pay them or was a joint contractor with him.

A. GROUNDS OF LIABILITY

A debt may be incurred on one's own account or through someone else. A *Karta* of a joint Hindu family may incur or contract a debt for necessity or benefit of the family. In case it is incurred through someone else its liability arises from a *legal duty*. In such cases the person incurring the debt is working as an agent of the person paying the debt.

When a person receives property of another as a donee his liability to pay debts of another arises on a *moral ground*. Such a liability is indirect liability.

Lastly, such a liability arises from a *religious duty* as when a son is required to pay his father's debts in order to save his father from falling into sin of non-

1. *Udaram* v. *Ranu*, (1875) 11 Bom HC 76.

payment.[2] The word *Putra* (पुत्र) in this connection is significant: a son (*Putra*) is one who saves his father from falling into *Narka* called *Pu. Narka* is believed to be an infernal region place beyond this world where a person's *Jivatma* goes after death to suffer for his sins.

We will consider this topic under the following two broad headings:

(*a*) Liability for debts under Mitakshara law, and

(*b*) Liability for debts under Dayabhaga law.

According to the Mitakshara law doctrine the sons are liable to pay debts contracted by their father for his personal benefit, during the time of their jointness, provided the debts are not tainted with illegal or immoral purposes.

B. DEBTS UNDER MITAKSHARA LAW

This heading can be divided into the following sub-headings:

(1) Liability to pay debts of a person to whose property one has succeeded as an heir.

(2) Liability to pay debts of a coparcener.

(3) Liability of a son to pay debts of his father.

(4) Liability of grandson and great-grandson to pay debts of the grandfather and great-grandfather.

1. Heir's liability

One who inherits the property of another must pay the debts incurred by such other person. Consequently a Hindu heir[3] is liable to pay the debts of the deceased out of the property he has inherited from the deceased. Whether the debts were incurred properly or for an unlawful or immoral purpose is out of question here. Such liability of an heir is, however, limited to the extent or value of the property inherited by him.[4]

In such cases the heir is not personally liable.

Now, if the heir has spent the property without payment of the debt a question arises as to what would happen in such cases. The answer is that the creditor in such a case cannot follow the property but he would hold the heir personally liable.[5]

At this juncture one should note that the heir is neither an executor nor an administrator of the property inherited by him. He is therefore not liable to distribute rateably the property amongst the creditors of the deceased.[6] It is not

---

2. *K.M. Ragothaman* v. *M.P. Rammappan*, AIR 1982 Mad 235. As Katyayana lays down in व्यवहार मयूख he who having received a loan or the like does not repay it to the owner, will be born hereafater in his creditor's house as a slave or a servant or a woman or a quadruped.
3. *See* the Hindu Succession Act, 1956, proviso to S. 6 for definition of "heir".
4. *Karimmudin* v. *Govind*, (1909) 36 IA 138: ILR 31 All 497.
5. *Veerasokkaraju* v. *Pappiah*, ILR (1906) 26 Mad 792: (1903) 26 Mad 792; *see* also *Jamburao Satappa Kochari* v. *Annappa*, 42 Bom LR 1066 (FB).
6. *Ibid.*

his duty to do so. But in such cases, if required, he has to prove[7] that the property inherited by him is insufficient to pay the debts. All those persons who get the property of the deceased either by way of testamentary succession or intestate succession, are included in the term "heir" (*see* Section 6 proviso to Hindu Succession Act, 1956).

Looking at Section 123 of the Transfer of Property Act a universal donee is also liable to pay his donor's debts to the extent of the property received by him.[8]

2. Liability for coparcener's debts

It is the legal duty of every coparcener to pay his debts. A creditor who has obtained a decree against a debtor-coparcener can get such coparcener's divided interest attached and sold in execution of the decree.[9]

If the creditor fails to execute his decree during the lifetime of such a coparcener he will be without any remedy because such a coparcener's share, on his death will pass to other coparceners by survivorship. However, if such a share is attached by the creditor in debtor's (coparcener's) lifetime, it may be sold after his death. Such a debt may be of any kind, i.e. it may have been incurred for a moral purpose or for an immoral purpose.

3. Liability of a son including grandsons and great-grandsons to pay the father's debts

Such liability falls into two broad divisions: (*a*) liability after partition; and (*b*) liability before partition. This second kind of liability may be (*i*) in respect of the debts incurred as a manager of the family, or it may be (*ii*) in respect of the father's personal debts.

(*a*) ***Liability after partition***.—So far as debts incurred by a father after partition or separation between himself and his sons are concerned, sons do not incur any liability.[10] However, if the debt in question is a pre-partition debt the sons would be liable even after partition.

(*b*) ***Liability for debts incurred before partition***.—Where a debt is incurred by the father as the manager of the joint Hindu family the liability of the son is on par with that of any other coparcener who is compelled to pay it. In such a case, the son will be liable to the extent of his interest in the coparcenary property.

In case the father incurs the debt for his personal benefit, the son will be liable, provided that the debt is not tainted with illegality or immorality.[11] One must note that this liability to pay his father's debt is based on the doctrine of

---

7. *Rathnammal* v. *Sundaram*, AIR 1933 Mad 508.
8. *Shahazad* v. *Madangopal*, AIR 1923 All 146.
9. See *Suraj Bunsi Koer* v. *Sheo Proshad Singh*, (1878-99) 6 IA 88: ILR 5 Cal 148.
10. *Pannalal* v. *Naraini*, AIR 1952 SC 170: 1952 SCR 544.
11. *Sita Ram* v. *Radha Bai*, AIR 1968 SC 534: (1968) 1 SCR 805.

pious obligation of a son to pay his father's debts. However, this liability is not personal but it is limited only to the extent of the interest received by the son in the coparcenary property. The liability exists during the father's lifetime and it continues so long as the father is liable. From this it follows that if the debt in question is barred by the law of limitation against the father, the son will also not be liable for it.

The question of a son's liability and its nature and extent has been dealt with in *Mulchand* v. *Jairamdas*[12], a Mumbai High Court case. Accordingly, if a father incurs a debt before partition of coparcenary property, the liability of the son is unaffected even after partition. If the partition is fake or colourable or mala fide, the rights of the creditors are not affected; however, the creditor's rights are affected if the partition is bona fide. As decided in *Pannalal case*[13] if a father and his son make an arrangement about debt and if it is reasonable and proper, the creditors cannot object to it. But if no such arrangement is made, the liability of a son stands.

If a suit is filed against the father before partition, the liability of the son stands for such pre-partition debt. However, if the father is sued after partition, the decree in such a suit cannot be executed against the son. Under the circumstances, a separate suit is to be filed against the son.

If the father is sued after partition for a pre-partition debt and the father dies pending the suit as a consequence whereof the separated son is brought on record and the suit is decreed, the son's liability would be fixed in execution proceedings. Such a liability would be in proportion to the property obtained by a son as a result of partition and no separate suit against the son is required to be filed for this purpose.

4. Doctrine of pious obligation of a Hindu son to pay his father's debts[14]

(*a*) *Meaning.*—Where a Hindu father as a manager of the Joint Hindu Family incurs a debt for legitimate family purposes the debt will be binding on his sons, grandsons and great-grandsons[15] to the extent of the coparcenary interest in the property. Hindu law thus imposes an obligation or duty upon the sons, grandsons and great-grandsons to pay out of the family property the debts of their ancestors. However, the debts should not be tainted with illegality or immorality or barred by the law of limitation.[16] The sons, etc. are liable to pay these debts even though they are not incurred for a legal necessity or for the benefit of the estate.[17]

---

12. AIR 1935 Bom 287: 156 IC 911.
13. *Pannalal* v. *Naraini*, AIR 1952 SC 170: 1952 SCR 544.
14. By its 174th Report the Law Commission of India has recommended to abolish this doctrine.
15. *Pannalal* v. *Naraini*, AIR 1952 SC 170; *Masit Ullah* v. *Damodar Prasad*, 48 All 518 PC: 53 IA 204.
16. *Girdharee Lall and Runjeet Panday* v. *Kantoo Lall*, (1873-74) 1 IA 321.
17. *Sita Ram* v. *Radha Bai*, AIR 1968 SC 534.

This doctrine, it must be said, is peculiar to Hindu law. The pious obligation of the son stems from an obligation of religion and piety for the son to rescue his father from the sin of non-payment. This doctrine is not merely religious but it has passed into the realm of law.[18]

(*b*) *Origin and basis*.—As to the origin of this doctrine the Supreme Court in *Sidheshwar Mukherjee case*[19] has said: "This doctrine, as is well-known, has its origin in the conception of Smriti-writers, who regard non-payment of debt as a positive sin, the evil consequence of which follow the undischarged debtor even in the afterworld. It is for the purpose of rescuing the father from his torments in the next world, that an obligation is imposed upon the sons to pay their father's debts. This doctrine as formulated in the original texts, has indeed been modified in some respects by judicial decisions. Under the law, as it now stands, the obligation of the sons (which expression includes throughout sons' sons and sons' sons' sons) is not a personal obligation existing irrespective of the receipt of any assets. It is a liability confined to the assets received by the son as his share in the joint family property or to his interest in the same. The obligation exists whether the sons are major or minor, or whether the father is alive or dead. If the debts have been contracted by the father, and they are not immoral or illegal, the interest of the sons in the coparcenary property can always be made liable for such debts." The Chennai High Court has very recently reiterated this view in *Shanmugha Udayar case*[20].

The doctrine is based on "religious considerations"[21] because if the father dies in indebtedness his soul may have to face evil consequences. The basis of the doctrine is thus spiritual and its sole object is to confer spiritual benefit on the father.[22] Thus the doctrine, as observed by the Privy Council[23], is not based for the benefit of the creditors or for the protection of third parties; it is based on the pious obligation of the sons to see their father's debts paid. However, it has now passed into the realm of law from merely remaining a religious doctrine.[24] This doctrine, one should note, is a necessary and logical corollary to the doctrine of the son's right by birth to a share in the ancestral property. In this very case the Supreme Court has held that this doctrine is based on justice, equity and good conscience and is therefore not opposed to the principles of Christianity. The doctrine consequently applies to Tamil Vanniya Christians of Chitooer Taluk because as a matter of custom they are governed by the Mitakshara school of Hindu law.

---

18. *Anthonyswamy* v. *M.R. Chinnaswamy Koundan*, (1969) 3 SCC 15: AIR 1970 SC 223.
19. *Sidheshwar Mukherjee* v. *Bhubneshwar Prasad Narain Singh*, AIR 1953 SC 487: 1954 SCR 177.
20. *Shanmugha Udayar* v. *Shivanandam*, AIR 1994 Mad 123; see also *Anthonyswamy* v. *M.R. Chinnaswamy Koundan*, (1969) 3 SCC 15: AIR 1970 SC 223.
21. *Luhar Amrit Lal Nagji* v. *Doshi Jayantilal Jethalal*, AIR 1960 SC 964.
22. *Ibid.*
23. *Satnarain* v. *Sri Krishan Das*, AIR 1936 PC 277, 280: 63 IA 384, 395.
24. *Anthonyswamy* v. *M.R. Chinnaswamy Koundan*, (1969) 3 SCC 15: (1970) 2 SCR 648: AIR 1970 SC 223.

The doctrine postulates that the father's debts must be Vyavaharika and not Avyavaharika.[25] The Hindu Succession Act, 1956 cannot be deemed to have abrogated this doctrine.[26]

The father dying during the lifetime of the son's grandfather, does not reduce the son's liability to pay his father's debts.[27]

(*c*) ***Reasons for liability.***—The reasons for such a liability of a son may be said to be (*i*) religion and piety[28] and (*ii*) the son taking interest in the ancestral property by his very birth. That is why the doctrine has been named as the Doctrine of Pious Obligation of a son to pay his father's debts.

(*d*) ***Nature of liability.***—(*i*) *Personal liability.*—The liability of a son is not personal. It is limited to the son's interest in the coparcenary property.[29] It follows from this that a son may be a minor or a major; the application of the doctrine has no exception. Moreover this obligation cannot be abrogated by the Indian Succession Act, 1956.[30]

Hemraj case (1943)

In *Hemraj* v. *Khem Chand*,[31] the Privy Council examined the nature of the avyavaharika debt. It examined the same with reference to the time when it originated i.e. when the liability was first incurred by the father. In this case there was a partition decree between two brothers, Hemraj and Danpal. A promissory note in the name of Danpal was allotted to Hemraj. It was provided that Danpal should file the note in the Court within seven days of the decree or he shall be responsible for the amount due together with interest. Danpal withheld the note till it became time barred. Then Hemraj sued Danpal and a decree was passed for that amount against Danpal. Pending an appeal from this decree Danpal died. In the execution proceedings against the sons of Danpal they took objection that the debt was created by the "misconduct and stupidity of Danpal." They were therefore not liable to repay it out of their share in the ancestral property. The subordinate judge accepted the plea and dismissed the execution application. Appeal was filed against this to the High Court, which stood dismissed. The High Court observed that,

The debt had its origin when the pro-note was allotted to Hemraj by the partition decree. Then it became the duty of Danpal to hand over the document to him in time. As he did not do so, he became liable for the amount. That is to say he became indebted to Hemraj for the amount due under the pro-note. The amount was then rightly due to Hemraj from Danpal. His sons are liable because their father failed to discharge his debt by retaining the promissory note which

---

25. *Luhar Amrit Lal Nagji* v. *Doshi Jayantilal Jethalal*, AIR 1960 SC 964.
26. *Modi Nathubhai* v. *Chhotubhai Manibhai*, AIR 1962 Guj 68.
27. *Devidas* v. *Jadaram*, 147 IC 225: AIR 1933 Lah 857.
28. *K.M. Ragothaman* v. *M.P. Rammappan*, AIR 1982 Mad 235.
29. *Bissesor Ram* v. *Ramakant Dubey*, 13 Pat 7.
30. *Nathubhai* v. *Chhotubhai*, AIR 1962 Guj 68; *Chandradatta* v. *Sant Kumar*, 1972 JLJ 917: 1973 MP LJ 7.
31. AIR 1943 PC 142: 70 IA 171: 209 IC 344.

he was bound to deliver to Hemraj. "The subsequent dishonest conduct of Danpal which led to the suit and the decree so much relied upon by the courts in India, and made the basis of their decision, cannot in their Lordships view affect the nature of the father's debt which at its inception was a joint and true debt."[32]

In 1925 the Division Bench of Madras High Court had already held in *Palanival Ramasubramania Pillai* v. *Siva Kami Ammal*,[33] that a debt which is not immoral at its inception is binding on the son though subsequently it may be tainted by dishonesty and immorality. The fault of the father cannot be an exonerating factor.

Debt which a son is not obliged to discharge:

The *Smritis* name the following debts which a son is not obliged to discharge.[34]

(*a*) debt incurred for drinking,

(*b*) debt incurred for lust, or

(*c*) gambling,

(*d*) unpaid fines,

(*e*) unpaid *shulka*,

(*f*) debts owed under idle or wasteful gifts,

(*g*) debt for being surety,

(*h*) commercial shulka, and

(*i*) debt that is not Vyavaharika (i.e. avyaharika).

Debts judicially held to be avyavaharika[35]

(*a*) a debt that would render the father liable to prosecution for criminal breach of trust.[36]

(*b*) father receiving money by misrepresentation of facts, i.e. by cheating. A money decree passed against him for payment of the amount.[37]

(*c*) Liability of father arising out of a crime of theft.[38]

(*d*) Cost of defending a suit by setting up a false Will.[39]

(*e*) Debt incurred to provide one's concubine (अवरुद्ध स्त्री) with funds for the expenses of her grand daughter's marriage.[40]

---

32. *Hemraj* v. *Khem Chand*, AIR 1943 PC 142: 70 IA 171: 209 IC 344, at p. 146.
33. AIR 1925 Mad 841: 21 Mad LW 606: 90 IC 165 at p. 845 and 853.
34. *See* Modern Hindu Law, p. 718.
35. *Ibid.* pp. 720-21.
36. *Toshanpal Singha* v. *Distt. Judge*, AIR 1934 PC 238: 61 IA 350: 151 IC 33.
37. *Nrusingha Charan Prusti* v. *Rati Kanta Mohonty*, AIR 1978 Ori 217.
38. *Perumal* v. *Devarajan*, AIR 1974 Mad 14: 86 Mad LW 395.
39. *Vedula Lakshmi Narasimhamurthi* v. *Meduri Venkata Jogisomayyulu*, (1939) 2 Mad LJ 499: AIR 1939 Mad 928.
40. *Pulavarthi Lakshmanaswami* v. *Raghavacharyulu*, ILR 1943 Mad 717: AIR 1943 Mad 292: (1943) 1 Mad LJ 104.

(*f*) Liability arising from misappropriation.[41]

(*g*) Subscription for the conduction of a lottery.[42]

(*h*) Monetary fine imposed by a court for committing a crime.[43]

Liability to prove that the debt of the father was avyavaharika, lies on the son.[44]

The son's pious obligation generally comes into existence on the death of his father. Only in exceptional cases does he come under the liability during his fathers' lifetime.[45]

The arguments that the father contracted the debts for his personal benefit and not for family purpose, or that the father was not the manager of the joint family when he incurred the debt, cannot affect the pious obligation of a son.

(*ii*) *Liability of sons who are joint with the father.*—The liability is limited to sons who are joint with the father, i.e. the separated sons are not liable for the debts incurred by the father after separation or partition. But such a son is liable for the pre-partition debts and, that too, to the extent of the share or interest he gets in the ancestral property. The creditor must obtain a decree against the sons too. In the case of undivided sons, the creditor cannot proceed against the son's interest in execution of a decree against the father alone. If a partition suit is pending at the time, the same principle will apply as the mere institution of a suit puts an end to the joint status as observed by the Chennai High Court.[46]

(*iii*) *Subsistence of liability.*—The son's liability subsists so long as the father's liability subsists. When the debts become time-barred as against the father, the son's liability to discharge the lawful debts of his father also ceases.

(*iv*) *Son's liability during father's lifetime.*—Even during the lifetime of the father the son's liability exists.[47]

(*v*) *Grandsons' and Great-Grandsons' liability.*—The liability of the grandson and the great-grandson is also similar to that of a son.[48]

(*vi*) *Liability for interest.*—The liability extends to the payment of interest subject to the rule of Damdupat wherever it applies.

As observed by the Allahabad High Court[49], if the joint family also comprises members other than the father and sons the son's liability does not become unenforceable or is not affected. Such other persons may be uncles,

---

41. *Bai Mani* v. *Usufali Bhudar*, AIR 1931 Bom 229: 33 Bom LR 130.
42. *Muthusami Servai* v. *N.K. Mytheen Pichai Rowther*, AIR 1937 Mad 344: (1937) 1 Mad LJ 231.
43. *Said Ahmed* v. *Raja Barkhandi Mahesh Pratab Narain Singh*, AIR 1932 Oudh 255: 9 Oudh WN 253: 139 IC 64.
44. *Sita Ram* v. *Radha Bai*, AIR 1968 SC 534; *Bhagbut Pershad* v. *Girja Koer*, (1888) 15 IA 99.
45. If the father has gone abroad, or is bed-ridden, or becomes an ascetic.
46. *Baluswami Ayyar, In re*, 51 Mad 417.
47. *Brij Narain* v. *Mangala Prasad*, 51 IA 129: AIR 1924 PC 50.
48. *Masit Ullah* v. *Damodar*, 53 IA 204.
49. *Lalta Prasad* v. *Gajadhar Shukul*, (1933) 55 All 283: 199 IC 181.

cousins, etc. Whether the father is or is not the manager of the joint family, a son's liability exists.[50]

(*vii*) *Liability not joint or joint and several.*—Liability of the son is neither joint with the ancestor nor joint and several with him. It arises from the obligation of religion and piety imposed upon the sons to pay the father's debts which are not immoral.

(*viii*) *Suit and enforcement of the decree.*—A question may arise as to a suit by the creditor and the enforcement of the decree. As regards the suit (*a*) both the father and the sons could be sued and decree enforced against the entire coparcenary property; (*b*) the creditor may sue the father alone and execute the decree against the entire family property which might include the interest of the son;[51] (*c*) if the father is dead the sons alone may be sued, but if the father is alive, sons alone cannot be sued.

As observed by the Mumbai High Court in *Shankar case*[52], even if a decree is obtained against the father and he dies before it is executed the same can be executed under Section 53 of the Civil Procedure Code by attachment and sale of the entire joint property in the hands of his sons and such property in the hands of the sons is to be deemed to be the property of the deceased which has come into the sons' hands as the legal representatives of the father.[53]

If a creditor sues only the father and obtains a money decree against him, he may proceed against the father's interest alone or he can proceed against the son's interest alone and put it up also for sale.[54]

Where a decree is obtained against a Hindu father (sons not being parties to the suit) the decree can be executed against the sons to the extent of the family property in their hands. However, if the decree is obtained against both the father and the son, the same could be restricted by the court to the interest of the sons in the family property. If not so restricted it can be executed against the property of the sons, whatever the nature of it, and against them personally.

(*ix*) *Cause of action and limitation.*—In so far as the cause of action and the beginning of the time is concerned there is one cause of action both against the father and the son and the period begins to run in both the cases from the time when the debt becomes due and payable. Limitation period against the father is 3 years in case of unsecured debts and 12 years in case of secured debts.[55]

---

50. *Lalta Prasad* v. *Gajadhar Shukul*, (1933) 55 All 283: 199 IC 181; also see *Devidas* v. *Jada Ram*, 15 Lah 50.
51. *See* S. 53, Civil Procedure Code.
52. *Shankar* v. *Premchand*, 32 Bom LR 919.
53. Per Shingne, J. in *Shankar* v. *Prem Chand*, 32 Bom LR 919.
54. *Sidheshwar Mukherjee* v. *Bhubneshwar Prasad Narain Singh*, AIR 1953 SC 487.
55. *See also* Article 120, Limitation Act.

(x) *Father's personal debts.*—Liability of the son to pay the personal debts of his father extends only to those debts which are not incurred by the father for illegal or immoral purposes. If the debts are for such purpose sons' interest in the joint family property would not be bound. In case a suit is filed against the father and the sons, objection by the sons could be raised. They can also raise objection about the factum of the debt. If no such objection is raised and the decree is made it becomes a *res judicata* and in subsequent execution proceedings no such objection can be raised. A decree against the father alone, passed when he was joint with the son, is binding upon the son even after partition, though it is open to him to impeach it either in an execution proceeding or in a separate suit, on the ground that the debt for which the decree was passed was incurred for an immoral or illegal purpose. The sons can file a suit for a declaration that the debt is not binding on them. An auction-purchaser may file a suit claiming to define and demarcate his interest and at that time also the sons can have this defence,[56] but they cannot dispute the factum of the debt, except where they can show that the decree was obtained by collusion or fraud and thus challenge the debt. This is because the decretal debt is not considered inferior to a mere contractual debt but is superior to such a debt. East Punjab[57] and Lahore[58] and Patna[59] High Courts hold contradictory views in this regard while the Chennai High Court[60] holds that it is not the form of a decree but the nature of the debt that determines the son's liability under the pious obligation rule after a decree is obtained against the father alone on the debt. The relevant question about the nature of the debt is whether it was an illegal or immoral debt at its inception, and if it was not so, the son is liable.

(xi) *Creditor's priority.*—As to the priority of the creditor it has been observed by the Privy Council in *Chokalingam case*[61] that no priority of payment out of joint family property exists in favour of the father's creditors as against the creditors of the son.[62]

5. Father's right to alienate coparcenary property: Nature of

As expressed in *Girdharee Lall case*,[63] for payment of his personal debts the father can alienate the whole of the coparcenary property, but the debts must be antecedent and not contracted for an immoral or illegal purpose. Such alienations bind the sons whether they consent or not, or whether the father is or

---

56. *Sidheshwar Mukherjee* v. *Bhubneshwar Prasad Narain Singh*, AIR 1953 SC 487.
57. *Surindra Nath* v. *Saralia Hindi Mahajani School*, AIR 1950 EP 282.
58. *Lala Maha Deo* v. *Ranbir Singh*, AIR 1944 Lah 220 (FB).
59. *Firm Pirthiraj Ganesh Das* v. *Kishun Lal*, AIR 1946 Pat 338.
60. *K. Swaminatha Ayyar* v. *K.G. Krishnaswami Ayyar*, AIR 1947 Mad 213.
61. *Chokalingam* v. *Official Assignee*, 45 Bom LR 563 (PC).
62. Justice Lokur has in this connection laid down six propositions (to the above effect) in *Surajmal Deoram* v. *Motiram Kalu*, (1939) 41 Bom LR 1177. To this the seventh was added in *Ramchandra* v. *Annaji*, (1943) 45 Bom LR 1037. For further details actual cases may be gone through.
63. *Girdharee Lall and Runjeet Panday* v. *Kantoo Lall*, (1873-74) 1 IA 321.

is not the manager of the joint family or whether the joint family is or is not composed of persons other than the father and sons.[64] This right of a father is additional to his ordinary right as a manager to charge or alienate the property in case of legal necessity. The question of legal necessity therefore is not to be considered here.

A father can charge or alienate the property for discharging his antecedent debt. This is his privilege. But a manager of the family who is not the father has no such right.[65] An uncle professing to act on behalf of a family cannot have such a right unless he proves that the transactions entered into by the father and grandfather of the plaintiff were not for legal necessity.[66] This position has been clearly summarised in *Brij Narain case* (supra) under the following propositions:

(1) The managing member of a joint undivided estate cannot alienate or burden the estate *qua* manager except for the purposes of necessity.

(2) If he is the father and the members are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of the debt.

(3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate.

(4) Antecedent debt means antecedent in fact as well as in time, i.e. the debt must be truly independent of, and not part of, the transaction impeached.

(5) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdened the estate, is alive or dead.

The word "debt" above covers all forms of debts including secured debts.[67]

6. What is an antecedent debt?

In Hindu law the expression "antecedent debt" implies (*i*) antecedent in point of time, and (*ii*) antecedent in fact or in nature.

Antecedent debt must be truly independent of and not part of the transaction impeached. Suppose, a debt is incurred at the time of sale or mortgage, then it is not an antecedent debt. Such a debt must exist prior to and independently of such a sale or mortgage. In other words the previous debt must not be a part of the subsequent transaction. The two debts must be in reality independent, separate and distinct.[68]

---

64. *Lalta Prasad* v. *Gajadhar Shukul*, 1933 All LJ 550.
65. *Brij Narain Rai* v. *Mangla Prasad*, 51 IA 129: (1924) 46 All 95: 77 IC 689.
66. *Chiranji Lal* v. *Bankey Lal*, 55 All 370 (FB); see also *Surajpal Singh* v. *Panchaiti Akhara Udasi Nirwani*, AIR 1939 All 486.
67. *Brij Narain Rai* v. *Mangla Prasad*, 51 IA 129: (1924) 46 All 95: 77 IC 689.
68. *Ram Rekha Singh* v. *Ganga Prasad Mukaraddhwaj*, 49 All 123.

A, the father of a joint Hindu family borrows Rs 2000 from *X* for his own use. He, thereafter, executes a mortgage of the joint Hindu family property to *X* in order to secure the debt. That the father used the money borrowed for immoral purposes is not proved. The mortgage binds the father's interest as well as his son's interest. The debt here is antecedent of the mortgage in fact as well as in time.

The Privy Council in *Brij Narain case*[69] drew a distinction between a simple personal money debt and a debt received by a mortgage of immovable property and the same has been approved by the Supreme Court of India in the cases shown below.[70]

7. Time-barred debts

The Hindu law does not recognise any time limit for recovery of debts. However, after the passing of the Indian Limitation Act, a Hindu is not bound to pay a time-barred debt.[71] Consequently when a debt is barred against the father, the sons are not under a pious obligation to pay it. It must be noted however that a promissory note[72] made by the father in respect of a time-barred debt is good against him. After his death the same is good against the sons.

Under Hindu law a time-barred debt is not an immoral debt and if a father alienates in consideration of such a time-barred debt the same is binding on the sons.[73]

At this juncture an important point may be noted that after partition of the property the father has no authority to renew pre-partition debts so as to make the sons liable, especially when a provision is made in the partition for payment of the debts by the father.[74]

8. What is an illegal or immoral debt?

The limitation of the sons' liability to pay their father's debts is based upon the text of Brihaspati (translated by Colebrooke). It lays down: "The sons are not compellable to pay sums due by their father for spirituous liquors, for losses at play, for promises made without any considerations or under the influence of lust or of wrath, or sums for which he is a surety, or for a fine or a toll, or the balance of either." For the amount of a bribe also the son is not liable. It boils down therefore that the father's debt has reference to the nature of the debt, rather than to the nature of the estate, whether ancestral or acquired by the

---

69. *Brij Narain Rai* v. *Mangla Prasad*, (1924) 51 IA 129: 46 All 95: 77 IC 689 (1924).
70. *Luhar Amrit Lal Nagji* v. *Doshi Jayantilal Jethalal*, AIR 1960 SC 964; *Virdhachalam Pillai* v. *Chaldean Syrian Bank Ltd.*, AIR 1964 SC 1425: (1964) 5 SCR 647; *Faqir Chand* v. *Harnam Kaur*, (1967) 1 SCR 68: AIR 1967 SC 727.
71. *See* S. 3, Limitation Act; *Nagarmal* v. *Bajranglal*, AIR 1950 PC 15.
72. *See* S. 25(3), Indian Contract Act.
73. *Jagdison* v. *Saraswathi Ammal*, AIR 1962 Mad 174; *Champalal Rupchand* v. *Rajachand Thakurbhai*, AIR 1932 Bom 522; *Gajadhar* v. *Jagannath*, 46 All 775.
74. *Vengruta H.* v. *Shri Venkata Narainmaha*, AIR 1965 AP 439.

creator of the debt.[75] Onus of proof by the sons is not discharged by proving a general charge of immorality, they have to establish a direct connection between the debt and acts of immorality alleged.[76] Whether the creditor had notice of this or not is not to be shown by the sons.[77]

There is no unanimity of opinions among scholars and courts, regarding the meaning of "Avyavaharika".[78]

The Privy Council in *Hemraj case*[79] has accepted the meaning given by Colebrooke, to the word "Avyavaharika" saying that it makes the nearest approach to the true concept of the term and may well be taken to express its correct meaning. Before making the sons liable for payment of their father's debts, the character of the debt must be examined from the standpoint of justice and morality. Moreover, the nature of the debt and the time when it originated has also to be examined. If it is found that the debt is not tainted or tarnished with immorality or illegality, the sons are bound to pay it. A debt which at its inception was a just and true one must be paid by the sons.[80]

A son is liable to pay debts which are legitimately incurred by his father, but he is not liable for those which are attributable to his failings, follies and caprices.[81] This view of the Mumbai High Court though not accepted by the Calcutta High Court[82], was later on reaffirmed by the Mumbai High Court in *Rama Krishna* v. *Narayan*[83].

---

75. *Girdharee Lall and Runjeet Panday* v. *Kantoo Lall*, (1873-74) 1 IA 321.
76. *Shyam Narain Singh* v. *Suraj Narain Pandey*, 35 Bom LR 301 (PC); *Musammat Gainda Kuer* v. *Sardu Ram*, AIR 1941 All 174.
77. *Pulavarthi Laxmanswami* v. *Shrimat Tirupat P.T. Raghasiacharulu*, AIR 1943 Mad 292: ILR 1943 Mad 717.
78. "Avyavaharika" means:—
    (*i*) "unusual or not sanctioned by law or custom" (*Darbar Khachar* v. *Khachar Harsur*, 32 Bom 348).
    (*ii*) "not lawful or customary" (*per* Ashutosh, J. in *Chhakauri Mahton* v. *Ganga Prashad*, 39 Cal 862).
    (*iii*) "not supportable as valid by legal arguments and on which no right could be established in creditor's favour in a court of justice" (*per* Sadashiv Ayyar, J. in *Venugopal* v. *Ramanadhan*, 73 Mad 458).
    (*iv*) "not righteous or proper" (*Bai Mani* v. *Usuf Ali*, 33 Bom LR 130).
    (*v*) "of a character which is illegal, dishonest or immoral" (*Govind Prasad* v. *Raghunath Prasad*, ILR (1939) Bom 533: 41 Bom LR 589).
    (*vi*) "the judicial decisions have in many cases accepted the comprehensive term 'illegal' or 'immoral' as including 'Avyavaharika' " (*per* Patkar, J. in *Bal* v. *Maneklal*, 34 Bom LR 55).
    (*vii*) "for a cause repugnant to good morals"—Colebrooke.
    (*viii*) "not legal or capable of being recovered by a lawsuit"—Gharpure.
    [Manek: *Handbook of Hindu Law*: Citing at pp. 325, 326.]
79. *Hem Raj* v. *Khem Chand*, (1944) 46 Bom LR 503 (PC).
80. *Ibid.*
81. *Darbar Khachar* v. *Khachar Harsur*, 32 Bom 348; for contra, see *Chakowri Mahton* v. *Ganga Prasad*, 39 Cal 862.
82. *Chakowri Mahton* v. *Ganga Prasad*, 39 Cal 862.
83. AIR 1939 Bom 289: ILR (1939) Bom 533: 41 Bom LR 589.

The following debts are recognised as immoral or Avyavaharika by various texts as observed in *Mulchand Hemraj case*[84]:

(*i*) debts for spirituous liquors;

(*ii*) debts due for losses at play;

(*iii*) debts due for promises made without consideration;

(*iv*) debts contracted under the influence of lust or wrath;

(*v*) debts for being surety for the appearance or for the honesty of another, but not for payment of money in default of the principal debtor;

(*vi*) unpaid fine; and

(*vii*) any debt which is Avyavaharika or which is rendered by Colebrooke as equivalent to a debt for a cause "repugnant to good morals";[85]

(*viii*) Besides these, all debts which the court regards as inequitable or unjust.

The distinction between a debt incurred by the father for the gratification of lust and that incurred by him for treatment of his disease contracted as a result of such gratification may be noted.[86] In the former there is an element of immorality (i.e. debt incurred due to lust), while in the latter there is no element of immorality as taking treatment to cure oneself of the disease is but natural. Consequently it is not a debt tainted with immorality and the son is bound to pay it.

(*ix*) money borrowed by the father, for defraying expenses of concubine;

(*x*) money borrowed and paid to a Hindu woman as a bribe for inducing her to take one of his sons in adoption;

(*xi*) money obtained by some criminal act, e.g. theft, cheating, criminal appropriation or criminal breach of trust;

(*xii*) money borrowed by the father in order to pay a fine imposed on him for some criminal act or offence;

(*xiii*) borrowed amount paid for the cost of a suit which the father knew to be a false one;

(*xiv*) decree for damages for malicious prosecution or for mesne profits for forcible wrong possession by father;

(*xv*) debt incurred for subscribing to a chit fund (an offence under Section 294-A of IPC) or receiving subscription for conducting a lottery.

(*xvi*) if the father is criminally liable to pay or discharge a liability the son is not bound to pay towards that, but if the father's liability originates in breach of civil duty, the son has to discharge it.

---

84. *Mulchand Hemraj* v. *Jairamdas Chaturbhuj*, AIR 1935 Bom 287.
85. *Ibid.*
86. *P.B. Bholick* v. *Budagaiah*, AIR 1958 AP 89.

In a Rajasthan High Court case the plaintiff's father was found to be illegally exporting opium outside Mewar territory. He was made liable to a certain amount as "Chori Mehsul". Such a levy upon the plaintiff's father was for a cause repugnant to good morals. The plaintiffs, therefore, were not liable to pay it.[87]

According to the Allahabad High Court any decretal amount passed by a court does not become "Avyavaharika" debt simply because the father has not done *pairvi* to it.[88]

9. Suretyship of father: Son's liability

There are four kinds of sureties recognised by Hindu law, viz.—

(*i*) for appearance;

(*ii*) for confidence or honesty;

(*iii*) for paying a sum lent; and

(*iv*) for delivery of debtor's property.

The surety himself is liable in all these cases. In so far as the first two kinds of sureties are concerned the sons may not be liable, but in the latter two they have been expressly declared to be liable.[89] So far as the liability of the grandsons is concerned the views of the Mumbai High Court and Allahabad High Court differ, the former considering the grandsons not liable unless the grandfather received consideration for undertaking suretyship,[90] while the latter considering them liable.[91]

In a Chennai case[92], a father executed a surety bond undertaking that the judgment-debtor would file an insolvency application within a specified time. The application was not filed and the father died. A question arose as to the liability of the sons. The court held that the "guarantee" in question was a guarantee "for confidence" or for "honesty" and consequently the sons were not liable.

10. Enforcement of liability after partition

The son's liability not being personal, the creditor cannot proceed against him or against his personal property. A son's liability is limited to the interest he gets in the property and it subsists so long as his father's liability subsists. If the debts are time barred against the father the son is not liable for them.

The Full Bench of the High Court of Gujarat has held in *Jayantilal case*[93] that if the father is adjudicated insolvent, the pious obligation of his son for pre-partition debts of the father comes to an end.

---

87. *State of Rajasthan* v. *Mohanlal*, AIR 1971 Raj 318.
88. *Likunnissah* v. *Hari Prasad*, AIR 1980 All 63.
89. *Choudhuri Govinda Chandra Das* v. *Hayagriba Upadhaya*, 10 Pat 94; *Daljit Singh* v. *Harkishan Lal Sah*, AIR 1940 All 116.
90. *Narayan* v. *Venkatacharya*, 28 Bom 408.
91. *Dwarkadas* v. *Kishandas*, 55 All 675.
92. *Kottapalli Lakshminarayana* v. *Kanuparti Hanumantha Rao*, 58 Mad 375.
93. *Jayantilal* v. *Shrikant*, AIR 1980 Guj 67.

If the creditor files a suit against the father before partition, the son becomes liable for such debts as are contracted before partition. But if a suit is filed against the father after partition, the decree in the suit cannot be executed against the son. In a suit for execution proceedings the sons can challenge their liability. A son's right to challenge a decree against the father for a debt was explained in *Bhagat Ram case*[94] by the Punjab High Court. The law in this regard is summarized by the court as follows:

"(1) On the principle of Hindu law the sons can challenge the existence of the debt when they are called upon to pay it. There is no justification or warrant to say that the decree against the father by itself creates a debt which they are bound to discharge.

(2) In such a situation the sons are entitled to show that the debt aforesaid was non-existing, fictitious or illusory. The mere fact that the father suffered a decree being passed against himself cannot be a ground for denying this right of the sons.

(3) Father, while defending a suit filed against him by a creditor for recovery of a debt not incurred by him for the benefit of the family, does not represent his sons, not even *qua* the plea of non-existence of the debt, which may or may not be raised by him, and the sons are not bound by the decree in respect of this plea under the principle embodied in Explanation VI to Section 11 of the Civil Procedure Code.

(4) This right to challenge the existence of the debt, if conceded to the sons, does not work any hardship on the creditor, because he can, by impleading the sons in the suit brought against the father, have this matter adjudicated upon in the presence of the sons".

The sons cannot be sued during the father's lifetime for recovery of a debt incurred by the father for his personal benefit.[95]

Whether the father is alive or dead, the son's pious liability to discharge his father's debt exists, is now well-settled.[96]

After the passing of a decree against the father if he dies before the decree is fully satisfied, the same may be executed against the sons who are liable to the extent of the joint family property that has come to their hands by survivorship. To fix the liability of sons the court may ask or compel them to produce the accounts in regard to such property (*see* Sections 50 and 53, CPC). Now if during execution of the decree if a question arises between the sons and the creditor as to the liability of the sons and whether the debt is tainted with illegality or immorality, the same has to be decided by the executing court. No separate suit is required to be filed[97] for this purpose. Besides, the question

---

94. *Bhagat Ram Kirpa Ram* v. *Ajudhiya Prakash*, AIR 1960 Punj 261; see also *Jaiprakash* v. *Lilabai*, AIR 1963 Bom 100.
95. *Sidheshwar Mukherjee* v. *Bhubneshwar Prasad Narain Singh*, AIR 1953 SC 487.
96. *Brundaban Chandra Das* v. *State of Orissa*, (1971) CWR 871; *Brij Narain* v. *Mangla Prasad*, 15 IA 829: AIR 1924 PC 50.
97. *Ibid.*; *Narain* v. *Sagunbhai*, 49 Bom 113: AIR 1925 Bom 193.

as to the non-existence of the debt can only be decided in such execution proceedings.[1] As expressed by the Supreme Court in *Pannalal* v. *Naraini*[2], the sons are at liberty to show in such proceedings that the property in their hands is for certain reasons not liable to pay the debts of their father. All such questions could be decided by the executing court under Section 47 of the CPC.

If the widow of the deceased father is not impleaded in a suit against the sons for recovery of the father's debt, and a decree is passed against the sons, the same cannot be executed against the widow's share.

The son can challenge the decree and the execution proceedings on the grounds that the original debt itself was non-existent or fictitious or illusory. In such a case the burden of proof to prove the debt lies on the creditor in the first instance and the burden to prove the non-existence of the debt shifts to the sons after the decree is passed.[3] The consent decree however stands on a different footing. Similarly, the burden of proof to prove the illegality or immorality of the father's debt lies on the sons. This burden is not discharged by showing that the father lived an extravagant and immoral life; a clear connection between the debt and the immorality has to be proved.[4]

C. DEBTS UNDER THE DAYABHAGA LAW

Compared to the Mitakshara law of debts the Dayabhaga law of debts is simpler. Under this school the sons and grandsons have no special liability as they have under the Mitakshara School. Reasons for this difference are quite apparent:

(*a*) Under the Dayabhaga School each member takes a defined share in the property, while under the Mitakshara law it is not so.

(*b*) Under the former the property passes to the heirs by succession. The coparceners do not take any interest by survivorship as in the latter.

(*c*) Consequently the doctrine of pious obligation is not recognised under the former.

Under the Dayabhaga School the whole property in the hands of the father and grandfather and great-grandfather is liable for the father's debts and can be attached and sold during their lifetime. After their death, a creditor can follow the property in whatever hands it may have gone. The reason is that in this school the nature of the debt does not affect the creditor's right and moral or legal debt is as much binding upon the debtor and his legal representatives as illegal or immoral debts. The manager can contract debts

---

1. *Pannalal* v. *Naraini*, AIR 1952 SC 170.
2. *Ibid.*
3. *Surindra Nath* v. *Saralia H.M. School*, AIR 1950 EP 282; *Lakshmadu* v. *Ramudu*, ILR 1940 Mad 123.
4. *Shyam Narain Singh* v. *Suraj Narain Pandey*, AIR 1933 PC 88: 141 IC 509 (1) PC; *Velirelli* v. *Venkataswarlu*, (1964) 2 Andh WR 484; *Narain* v. *Chamber of Commerce*, ILR (1968) 18 Raj 1212. *See* also *Brahmanand Pande* v. *Kanduri Charan Das*, AIR 1959 Ori 126.

for business and family purposes and such debts bind all the members of the family.

When a loan is taken for a private purpose the rules as regards the liability to pay it are as follows:

(*a*) The separate property of the debtor is liable for payment of his debts in his lifetime, as well as after his death.

(*b*) Under this school each coparcener takes a defined share in the property of the family and on his death it passes to his heirs by succession and not by survivorship. Such interest in the property is liable for the payment of his debts during his lifetime as well as after his death.

(*c*) The sons, grandsons and great-grandsons do not acquire any interest in the ancestral property by birth. The father therefore can sell or mortgage even the whole of the ancestral property in his hands for payment of his debts, irrespective of the character of his debts.

(*d*) On a Hindu dying leaving debts his heirs are bound to pay these debts out of the property left by the deceased. However, they are not personally liable for such debts.[5]

D. ABOLITION OF PIOUS OBLIGATION

The state of Kerala, has, in 1976, by the Kerala Joint Hindu Family System (Abolition) Act, 1976,[6] abrogated the rule of the pious obligation of a Hindu son in Kerala State from the date of the commencement of the Act i.e. from December, 1976.

Similarly, Parliament by making relevant variations in sub-section (4) of Section 3 of the Hindu Succession (Amendment) Act, 2005, has abrogated throughout India this rule, excepting the State of Jammu and Kashmir with effect from 9th September, 2005.

It must be remembered that the reason for imposing this obligation is not any religious injunction but the reason for this obligation is based on the son's right by birth in the ancestral property. It is, as pointed out by Ramaswami J. not all, "a gratuitous obligation thrust on him."[7] Therefore the expression "pious obligation" is a misnomer. There is a *quid pro quo* for this obligation. Right and obligation must go together. The Mitakshara gave a son, right by birth, hence it recognised this obligation. The Dayabhaga did not recognise the right by birth, hence, it has not imposed this obligation.

The Hindu Succession (Amendment) Act, 2005 does not abolish the right by birth given to a son. It on the contrary entitles a daughter also to that right. Therefore logically speaking, along with the son, the daughter, should also have

---

5. *Abdul Rehman* v. *Gajendhra Lal*, 1 Cal 132.
6. Section 5(1) of the Act.
7. *Anthonyswamy* v. *M.R. Chinnaswamy Koundan*, (1969) 3 SCC 15.

been brought under this obligation, because justice required that rights and duties go hand in hand.

> "It is not a balanced approach to take from the father as a matter of right without any duty to return to him when he is in a genuine need. This is a bad law for it violates a sound principle of jurisprudence that "RIGHTS AND DUTIES GO HAND IN HAND."

Chapter V
Partition and Reunion

SYNOPSIS

A. Partition
1. What is partition
   (*a*) Definition
   (*b*) Two different senses of
   (*c*) Explanation
2. Family arrangement
   (*a*) Definition
   (*b*) Requisites of
   (*c*) Family
3. Partition and family arrangement: Difference
   (*a*) As to type of decision
   (*b*) As to object
   (*c*) As to capacity
4. Agreement not to partition how far valid
5. Property liable to partition
   Exceptions
6. Provisions to be made on partition
   (*a*) Debts
   (*b*) Marriage expenses
   (*c*) Thread Ceremony
   (*d*) Maintenance
   (*e*) Funeral ceremony of the last male holder's mother
7. How partition is effected
   (*a*) Partition by agreement
   (*b*) Partition by conduct
   (*c*) Partition by arbitration
   (*d*) Partition by registered notice
   (*e*) Partition by Will
   (*f*) Partition by apostasy
   (*g*) Partition by marriage under the Special Marriage Act
   (*h*) oral partition
   (*i*) Partition by institution of a suit
   (*j*) Partition by renunciation
   (*k*) Partition by sale by one coparcener to another
   (*l*) Partition by any other conduct
   (*m*) Hindu Succession Act, 1956: Effect of
8. What does not bring about partition?
9. Persons entitled to sue for partition
10. Persons who cannot sue for partition
11. Parties necessary to a partition suit
12. Special power of a Hindu father to effect partition
13. Son's right to sue his father for partition
14. Births and deaths in family: Effect on partition
15. Sons born subsequently
16. Persons entitled to a share
   (*a*) Males
   (*b*) Females: General
   (*c*) Purchaser from coparcener
17. Allotment of shares
18. Partial partition
   (*a*) Types of partial partition
   (*b*) When a suit for partial partition can be maintained
   (*c*) Partial partition as regards property
   (*d*) Partial partition as regards persons
19. Reopening partition
20. The effect of partition

B. Reunion
21. Reunion
   (*a*) Meaning
   (*b*) Conditions of a valid reunion
   (*c*) Effect of reunion
22. Exclusion from partition
23. Partition under *Dayabhaga* law
24. Difference from *Mitakshara* system
   (*a*) Partition
   (*b*) Allotment of shares
   (*c*) Expression of intention to separate
   (*d*) Persons entitled to claim partition
   (*e*) Fractional share
   (*f*) Summary

A. PARTITION

1. What is partition?

(*a*) *Definition.*—No individual member of an undivided Mitakshara family can claim that he has a certain definite share in the joint property. Partition according to that law consists in defining the shares of the coparceners in the joint property; an actual division of the joint property by metes and bounds is not necessary.[1] Once the shares are defined the partition is complete; it is not essential that the property should be divided by metes and bounds. Partition thus signifies an allotment of specific portions of the property among the co-sharers. It is the division of the joint property among the individuals owning jointly.[2]

Under the Dayabhaga system of Hindu law, each coparcener of an undivided family has a certain definite share in the joint property of which he is the absolute owner. The undivided co-sharers hold the joint property as tenants-in-common in well-defined shares. On partition each co-sharer gets a specific portion of the property according to his share. Therefore partition, according to this school, consists in the division of the joint property by metes and bounds, and not in defining the shares, as under the Mitakshara law.[3]

(*b*) *Two different senses of*—The word partition is thus used in two different senses, namely (*i*) division of title or severance of status, and (*ii*) division of property. While generally the word is used in the second sense, i.e. actual division of property, in the Mitakshara School of law it is used in the first sense whether the severance is or is not coupled with actual division of property.

(*c*) *Explanation.*—It is therefore rightly said that "Partition is the *intentional severance*[4] of coparcenary property by members of a joint family"; it is "the adjustment into specific portions of diverse rights of different members accruing to the whole of the family property". In effect it is a severance of the joint status and community of interest. As observed by the Privy Council in the case of *Anuraga*[5], under the Mitakshara law it consists in defining the shares of the coparceners in the joint property; and it is not necessary that there should be an actual physical division of property or division by metes and bounds.[6] Partition should not be confused with the *de facto* division of property and allotment of shares.[7]

Partition or no partition is a matter entirely of intention. The mere ascertainment of the shares of the remaining members on the separation of one

---

1. *Approvier* v. *Rama Subba Aiyar*, (1886) 11 MIA 75.
2. *Vasantiben Prahladji Nayak* v. *Somnath Muljibhai Nayak*, (2004) 3 SCC 376.
3. A.C. Sen: *Mozley & Whiteley's Law Dictionary: Indian Supplement*, 8th Edn., p. 93.
4. See *Raghavamma* v. *Chenchamma*, AIR 1964 SC 136. Emphasis Supplied.
5. *Anuraga Kuer* v. *Darshan Raut*, 40 Bom LR 758 (PC).
6. *Girjanandini Devi* v. *Bijendra Narain Choudhary*, AIR 1967 SC 1124: (1967) 1 SCR 93; *Approvier* v. *Rama Subba Aiyar*, 11 MIA 75; *see* also *Jatru Pahan* v. *Ambikaji*, AIR 1947 Pat 570.
7. *Nilkanth Krishnarao* v. *Viraj Ramachandra*, (1991) 1 HLR 224 (Bom).

of them does not per se operate as a disruption of status of all of them without a present intention to divide in status.[8] Thus it requires an unequivocal declaration by a member of his intention to be divided in status to effect a severance.[9] This intention may be intimated by sending a notice.[10] On defining the shares of the members the property ceases to be joint, i.e. the parties then hold it as tenants-in-common and the right to take by survivorship comes to an end.[11] *Girja Bai case*[12] sums up the above discussion when it says that *partition is a matter of individual volition* and reduces the members to the position of tenants-in-common, *requiring only a definite unequivocal intention on the part of a member to separate and enjoy his share in absolute severalty.* No consent of other members of the family nor a decree of a court or any other writing is necessary for effecting a partition, its true test being "the intention of the members of the family to become separate owners".[13] The intention however should be real and genuine and not sham or pretentious. Partition thus changes the mode of enjoyment of property along with an alteration in status; it divides the joint title into a number of separate ones.[14]

Mayukha therefore rightly explains that partition is only a particular condition of the mind and mere intention to separate constitutes a partition.

In *Commissioner of Gift Tax* v. *N.S. Getti Chettiar*,[15] the Supreme Court has held that partition cannot be called as disposition, conveyance, assignment, settlement, delivery, payment or alienation within the meaning of these words in Section 2(*xxvi*) of the Gift Tax Act, 1958, because it does not involve the transfer of property. The coparcener has already an antecedent title to the property wherefrom he gets a share. He does not get any new title.[16] It does not amount to acquisition of property by transfer, nor it is a conveyance.[17] The true nature of partition, as observed by Supreme Court in *CED* v. *Kancharla Kesava Rao*,[18] is that it is an adjustment of the rights of the various members of the family.

It is worth noting that under the Hindu Personal law partition takes place as soon as a declaration is made for it but under the taxation laws its procedure is laid down in the Acts concerned.[19]

---

8. *Bal Krishna* v. *Ram Krishna*, 33 Bom LR 1280: 35 CWN 815: 1931 PC 154.
9. *K. Ramalinga Annavi* v. *Narayana Annavi*, 20 ALJ 839 (PC); *Venkatpathi Raju* v. *Venkatanarsimha Raju*, 38 Bom LR 1238 (PC).
10. *Ibid.*
11. *Malick Harkishan Singh* v. *Malick Partap Singh*, 40 Bom LR 1068 (PC).
12. *Girja Bai* v. *Sadashiv*, 43 IA 151.
13. *Approvier* v. *Rama Subba Aiyar*, (1886) 11 MIA 75; see also *Jalaja Shedthi* v. *Lakshmi Shedthi*, (1973) 2 SCC 773: AIR 1973 SC 2658.
14. *Dnyneshwar* v. *Anant*, AIR 1941 Nag 209; *K.R. Sankaralingam Pillai* v. *Veluchami Pillai*, AIR 1943 Mad 43 (FB).
15. (1971) 2 SCC 741: AIR 1971 SC 2410.
16. *Vasantiben Prahladji Nayak* v. *Somnath Muljibhai Nayak*, (2004) 3 SCC 376.
17. *V.N. Sarin* v. *Ajit Kumar Poplai*, AIR 1966 SC 432: (1966) 1 SCR 349.
18. (1973) 2 SCC 384: AIR 1973 SC 2484.
19. E.g. S. 171, Income Tax Act, 1961; S. 20, Wealth Tax Act, 1957.

The Supreme Court of India reviewing the case law on the subject in *Kalyani case*[20], observed: "To constitute a partition, all that is necessary is a definite and unequivocal intention by a member of a joint family to separate himself from the family. What form such intimation, indication or representation of such interest should take, would depend upon the circumstances of each case. A further requirement is that this unequivocal indication to separate must be to the knowledge of the persons affected by such declaration."

Such intention may express itself (*i*) by explicit declaration; or (*ii*) may be established from consistent and uniform course of conduct of the party concerned; or (*iii*) may be declared orally or (*iv*) may be in writing. It manifests itself in various ways, i.e. (*a*) by making an application for mutation of names in record of rights with a view to enjoy separately, (*b*) by filing a plaint for partition, (*c*) by giving a written notice to the parties concerned demanding partition, (*d*) by agreement of reference to arbitration for partition, (*e*) by defining and ascertaining shares of various family members by an agreement.[21]

However the following have to be remembered that there are certain circumstances which create an illusion of partition but by themselves they are not capable of establishing partition unless coupled with the requisite intention. They are:

(*i*) separate enjoyment of property;

(*ii*) separate income or expenditure;

(*iii*) separate food;

(*iv*) separate dwelling;

(*v*) separate worship;

(*vi*) business transactions among the coparceners *inter se*.

On the other hand, if partition is already effected and yet some of the members are living together that is not inconsistent with their being divided.[22]

2. Family arrangement

(*a*) ***Definition.***—As observed in *Halsbury's Laws of England*[23] a family arrangement is an agreement between members of the same family intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour.

The agreement may be implied from a long course of dealing, but it is more usual to embody or to effectuate the agreement in a deed to which the term "family arrangement" is applied. Family arrangements are governed by

---

20. *Kalyani* v. *Narayanan*, 1980 Supp SCC 298: AIR 1980 SC 1173.
21. See *Nani Bai* v. *Gita Bai Kom Rama Gunge*, AIR 1958 SC 706, 713.
22. *Ramasray Prasad* v. *Radhika Debi*, 38 Bom LR 120 (PC).
23. 3rd Edn., Vol. 17, pp. 215 & 216.

principles which are not applicable to dealings between strangers. Courts while deciding the rights of parties under family arrangements or claims upset such arrangements, considers what in the broadest view of the matter is most beneficial for the interest of families, and has regard to consideration which, in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements.[24]

A family arrangement is in the nature of an agreement. There is an element of some give and take on both the sides.[25]

Its object is to preserve goodwill among the members and to save the peace and honour of the family.[26]

A family arrangement resolves family disputes and that even disputes based upon ignorance of parties as to their rights may afford a sufficient ground to sustain it.[27]

(*b*) ***Requisites of.***—The above views expressed in *Halsbury's Laws of England* and quoted in *Maturi Pullaiah case*[28] have been again reiterated by the Supreme Court of India in *M.N. Aryamurthi case*[29], observing that there are three things necessary to constitute a family arrangement: (*i*) agreement, (*ii*) object of the agreement; and (*iii*) consideration for the agreement, the consideration being the expectation that such an agreement or settlement will result in establishing or ensuring amity and goodwill amongst the relations.

The courts have taken a liberal view in this matter so as to encourage consent settlements and ensure that the agreements arrived at are not allowed to be reopened by the parties to the agreement on frivolous or untenable grounds. The settlement, however, must be voluntary, fair and equitable and effected to resolve family disputes. In *Premlall Seal case*[30], the question of validity of family arrangement came up for consideration. Facts in brief were that a father grants a licence to his son to reside in a portion of the family house on condition that he would behave properly, otherwise the licence would be cancelled. Later, on the son's misbehaviour, the father revoked the licence. The son's plea was that there was a family arrangement under which he was given possession of the property but this was held untenable. The court held that it was a case of licence granted by the father to the son for buying peace on the condition that he would behave well and in case of default, suffer cancellation of the licence which is

---

24. 3rd Edn., Vol. 17, pp. 215 & 216.
25. *Ram Lakhan Chaudhary* v. *Haridwar Chaudhary*, (2005) 12 SCC 383: *Hari Shankar Singhania* v. *Gaur Hari Singhania*, (2006) 4 SCC 658.
26. *Ram Charan Das* v. *Girja Nandini Devi*, AIR 1966 SC 323: (1965) 3 SCR 841; *Manali Singhal* v. *Ravi Singhal*, (1999) 1 HLR 648 (Del).
27. *Maturi Pullaiah* v. *Maturi Narasimham*, AIR 1966 SC 1836, 1839: (1967) 2 MLJ (SC) 14.
28. *Ibid.*
29. *M.N. Aryamurthy* v. *M.D. Subbaraya Setty*, (1972) 4 SCC 1, 7-9: AIR 1972 SC 1279, 1284-1287.
30. *Premlall Seal* v. *Basanti Seal*, AIR 2004 Cal 246.

always revocable. Thus this was not a case of family arrangement or settlement of the property.

(*c*) ***Family***.—The word "family" has been explained as not to be understood in a narrow sense of being a group of persons who are recognised in law as having a right of succession or having a claim to a share in the property in dispute. If the dispute which is settled is one between near relations then the settlement of such a dispute can be considered as a family arrangement.[31]

3. Partition and family arrangement: Difference

A family arrangement settles the mode of enjoyment of family property. Such an arrangement as such does not put an end to the joint status. In other words it is possible for members of a joint family to divide property among themselves for the purpose of convenient enjoyment or management without the intention of making a partition.[32]

One must note the following points of difference between partition and family arrangement.

(*a*) ***As to type of decision***.—The first important point of difference is that a family arrangement can never be a unilateral decision; partition may be effected by a unilateral declaration. In other words bringing of a suit by a member itself brings to an end the joint status.[33] The very filing of a partition suit would amount to a declaration of intention to separate.[34]

(*b*) ***As to object***.—Secondly, whereas the object of a family arrangement, as said before, is settling of a bona fide dispute arising out of conflicting claims to property, it is not so in partition.

(*c*) ***As to capacity***.—Lastly, a widow or other limited owner or a manager can enter into a family arrangement with persons who are not coparceners, whereas a partition can be effected by coparceners alone.

4. Agreement not to partition how far valid

As decided by the Calcutta High Court, an agreement for consideration and for a limited period of time not to partition coparcenary property is valid.[35] However it is not binding upon heirs or their assignees.[36] At the same time it must be remembered that agreement not to partition in perpetuity is bad.[37] Similarly a direction in a will not to partition is void.[38] A similar view is held by

---

31. *Krishna Beharilal* v. *Gulabchand*, (1971) 1 SCC 837, 843: AIR 1971 SC 1041.
32. *I.C. Gupta* v. *Distt. Judge*, 1979 RCJ 239.
33. *Asa Nand* v. *Baldev Raj*, AIR 1975 All 139, 141.
34. *Nabisha* v. *Arumuga*, AIR 1974 Mad 273.
35. *Srimohan Thakur* v. *W.O. MacGregor*, 28 Cal 769; *Radha Nath Mukerjee* v. *Tarak Nath Mukerjee*, (1875) 3 CWN 126; *Shri Krishna* v. *Debendra*, 12 CWN 793; *Chaitya Dassya* v. *Madan Chandra Das*, 20 CWN 92.
36. *Rajendra Dutt* v. *Sham Chund Mitter*, ILR (1881) 6 Cal 106.
37. *Radhanath* v. *Tarrueknath*, 3 CWN 126: 63 CLJ 71.
38. *Ram Kishore* v. *Debendra Nath*, 15 Cal 409: 15 IA 37 PC.

the Mumbai High Court in *Ramalinga case*[39] which observes that agreement between coparceners not to partition coparcenary property does not bind even the parties thereto, and notwithstanding the agreement, any party may sue the other parties for partition.

A compromise followed up by a decree provided that the properties which formed the subject matter of the suit should be divided but certain other properties should be kept joint for ever, the stipulation was enforceable as it formed the consideration for the compromise.[40]

5. Property liable to partition

Prima facie all coparcenary property, whether movable or immovable (also known as joint family property) is liable to partition.[41] However, the following properties are not liable to partition:

Exceptions.—(*i*) Impartible property, i.e. property which by custom or under any provision of law or by terms of its grant descends to one member of the family to the exclusion of others, for example, Raj or Principality.

(*ii*) Separate property (also known as self-acquired property) of a member.[42]

(*iii*) Property which by its very nature is indivisible. For example, animals, furniture, etc. are not divisible.

In such cases the property may be sold and its value distributed or, as held by the Calcutta High Court,[43] a money compensation may be paid to coparceners other than those to whom it is given. Similarly family idols and places of worship[44] are not divisible and therefore like a well[45] or a right of way[46] it may be enjoyed by turns[47] or jointly as is convenient. A common passage, or land reserved for common passage, common courtyard and staircase are also impartible.[48]

Family idols and relics which are objects of worship, are construed in law to be juridical persons and hence incapable of division.

---

39. *Ramalinga* v. *Vimpakshi*, 7 Bom 538.
40. *Jyotish Chandra Narayan Ray* v. *Radhika Chandra Narayan Ray*, AIR 1933 Cal 892: 60 Cal 1078: 37 CWN 1018: 58 CLJ 322.
41. *Suraj Bansi Koer* v. *Sheo Prasad*, 6 IA 88: 5 Cal 148.
42. *Sathyaprema Manjunath Gowda* v. *CED*, (1997) 10 SCC 684; *Jayamma* v. *Thimmamma*, (1996) 1 SCC 506.
43. *Ahasannullah* v. *Kali*, 10 Cal 675.
44. *Damodar Das* v. *Uttam Ram*, 12 Bom 271; *Pramatha Nath Mullick* v. *Pradyumma Kumar Mullick*, AIR 1925 PC 139: 52 IA 245: 52 Cal 809 (PC).
45. *Govind* v. *Trimbak*, 36 Bom 275.
46. *Nathubhai* v. *Bai Hansjavi*, 36 Bom 379.
47. *Damodardas Maneklal* v. *Uttamram Maneklal*, 17 Bom 271.
48. *Dina Nath* v. *Mansa Ram*, AIR 1973 P&H 253; see also *Kalyani* v. *Narayanan*, 1980 Supp SCC 298: AIR 1980 SC 1173; *Nagesh Bisto Desai* v. *Khando Tirmal Desai*, (1982) 2 SCC 79: AIR 1982 SC 887.

6. Provisions to be made on partition

At the time of partitioning provisions for the following matters have to be made first:

(*a*) ***Debts***.—(*i*) Provision for joint family debts payable out of joint family property.[49]

(*ii*) Personal debts of the father which are not incurred for illegal or immoral purposes.[50]

(*b*) ***Marriage expenses***.—Marriage expenses of unmarried daughters or sisters,[51] but not of any unmarried coparceners[52] or for the daughters of other coparceners.[53]

(*c*) ***Thread Ceremony***.—Provision has to be made for the thread ceremony of the members of the family.[54]

(*d*) ***Maintenance***.—Maintenance of unmarried daughters or sisters, and disqualified heirs, that is lunatics or idiots by birth.

(*e*) ***Funeral ceremony of the last male holder's mother***.—One must note that the marriage expenses of unmarried daughters and sisters have to be met out of their father's share (branchwise) and not out of the shares of the uncles. Another important point one has to note is that at the time of partition the parties have no right to look back and claim relief against past inequalities of enjoyment of members.

The marriage expenses of male members must be paid out of the family funds, so long as the family continues to remain joint. But when a suit for partition is filed, it operates as a severance of the family and expenses incurred between the institution of the suit and the decree would fall upon the share of the person concerned; no obligation rests upon other members in this respect.[55]

A coparcener, in a suit for partition, is not entitled to mesne profits.[56] But there is no absolute rule that in a partition suit among the members of a Hindu joint family a claim for mesne profits is unsustainable. Where any member has been excluded such claim surely lies.[57]

Property bequeathed by father by his Will cannot be an object of partition after his death.[58] Property owned absolutely after the commencement of the

---

49. *Mangoolal* v. *Maharaj*, AIR 1962 All 24.
50. *Satnarain* v. *Sri Krishan Das*, AIR 1936 PC 277: 38 Bom LR 1129.
51. *Dasa Singh* v. *Jasmer Singh*, (2003) 2 HLR 152 (P&H).
52. *Ramalinga* v. *Narayana*, AIR 1922 PC 201: 40 IA 168.
53. *Ramlal* v. *Kanhaiyalal*, 1972 MPLJ 805.
54. *Jairam Nathu* v. *Nathu Shamji*, ILR (1907) 31 Bom 54: 8 Bom LR 632.
55. *Ramalinga* v. *Narayana*, 49 IA 168. Also see *Ganesh Mahadev Deshpande* v. *Shriniwas Madhav Deshpande*, 30 BLR 457.
56. *T. Ramasamy Aiyar* v. *T. Subramania Aiyar*, 43 MLJ 406: 46 Mad 47.
57. *Rajah Venkata Narasimha Appa Row Bahadur* v. *Rajah Narayya Appa Row Bahadur*, (1879-80) 7 IA 38.
58. *Nepal Krishna Roy* v. *Baidya Nath Poddar*, 1995 Supp (1) SCC 289.

HSA by a female member of the family cannot be the subject of partition.[59] There are certain properties which are impartible due to family custom[60] and certain properties are indivisible in their essential nature. They are not divisible.[61]

7. How partition is effected

A partition may be effected in any one of the following ways:

(*a*) by agreement[62];

(*b*) by conduct;

(*c*) by arbitration;

(*d*) by registered notice: *Girja Bai case*[63];

(*e*) by Will;

(*f*) by apostasy;

(*g*) by marriage of a coparcener under the Special Marriage Act;

(*h*) oral partition;

(*i*) by institution of a suit, (*Girja Bai case* supra);

(*j*) by renunciation of a share;

(*k*) by sale by one coparceners to another;

(*l*) by any other conduct (*Alluri case*[64]).

(*m*) Hindu Succession Act, 1956: effect of.

As observed in *Girja Bai case*[65], intimation by a member of the coparcenary, to his coparceners, of his unequivocal intention to sever himself from the coparcenary brings into being his unimpeachable right to obtain and possess his share whether or not they agree to a separation; and there is immediate severance of the family. Intention must be communicated to be effective.[66] An act of volition which is kept secret could not be legally effective. Intention may be evidenced by conduct.[67] The severance of status takes place

---

59. *E. Vinod* v. *R. Sathamma*, (2005) 1 HLR 153 (AP).
60. *Ramalakshmi Ammal* v. *Shivanath Perumal Sethurayar*, (1870-72) 14 MIA 570: 12 Beng LR 396; *Kachi Kaliyan Rengappa* v. *Kachi Yuva Rengappa*, (1905) 32 IA 261: ILR (1905) 28 Mad 508: 2 All LJ 845. (They descend upon one member only by the rule of primogeniture: ज्येष्ठाधिकार).
61. E.g. Wells, passages or ways, courtyards, staircases. They are used jointly: *Dina Nath* v. *Mansa Ram*, AIR 1973 P&H 253: 1972 Cur LJ 417.
62. *Harkishan Singh* v. *Pratap*, AIR 1938 PC 189.
63. *Girja Bai* v. *Sadashiv Dhundiraj*, (1915-16) 43 IA 151.
64. 38 Bom LR 1318.
65. *Girja Bai* v. *Sadashiv*, 43 IA 151; *Puttrangamma* v. *Ranganna*, AIR 1968 SC 1018.
66. *Saraswatamma* v. *Paddayya*, 46 Mad 349; *Pattrangamma* v. *Ranjanna*, 31 Bom LR 1067; *Puttrangamma* v. *Ranganna*, AIR 1968 SC 1018.
67. *Dnyneshwar* v. *Anant*, 38 Bom LR 579: AIR 1941 Nag 209.

from the date on which the communication of intention to separate is sent and not when it is actually received by the coparceners.[68]

This intention to separate may be evinced in different ways, either by explicit declaration or by conduct of the party concerned or of other members of the family.

(*a*) ***Partition by agreement.***—Though there is no physical division of property, execution of an agreement in writing to hold the property separately operates as a partition.[69] If the agreement on the face of it declares the intention to separate, no evidence of the subsequent acts of the parties to control or alter the legal effect of the document is admissible, i.e. if the intention is clear, subsequent conduct of the parties is of no consequence.[70] In case the intention is not clear, it may be gathered from the subsequent conduct of the parties.[71] If the partition is sham and nominal, the court would not recognise it.[72]

The agreement to separate may be oral but the true test of partition is the intention to separate. There may not be an actual division of property by metes and bounds, but intention there must be.[73] Therefore the two ideas, the severance of the joint status and a *de facto* division of property must be kept distinct. Where a deed provides for severance of status from a future date, in that case there is no separation of interest till the time comes and the members hold as joint tenants. The parties are not free to alter or modify the legal effect of the agreement by a subsequent act or conduct.[74] A severance of status takes place from the date of signing of the agreement. A written agreement need not be registered if it merely records what had happened.[75]

(*b*) ***Partition by conduct.***—The declaration of a coparcener's intention to sever need not necessarily be by word of mouth; it can be inferred from his conduct too. A clear declaration of separation followed by a division of all properties establishes the fact of disruption completely.[76] Conduct of parties coupled with attendant circumstances is clear proof of separation.[77] If the joint family members actually divide the joint family property by metes and bounds and enjoy their shares separately, it will be a clear case of partition. A mere ascertainment of shares of members is not conclusive evidence of separation,

---

68. *Nyapati Narayana Rao* v. *Mudhavalapu Purushothama Rao*, AIR 1938 Mad 390.
69. *Approvier* v. *Rama Subba Aiyar*, (1886) 11 MIA 75; *Digambar Adhar Patil* v. *Devram Girdhar Patil*, 1995 Supp (2) SCC 428; *Pallapothu Naga Prasad* v. *Pallapathu Venkat Krishan Rao*, (2003) 1 HLR 187 (AP).
70. *Malick Harkishan Singh* v. *Malick Partap Singh*, 40 Bom LR 1068 (PC).
71. *Durga Prasad* v. *Kundan*, 13 Beng LR 235.
72. *Kalva Devadattam* v. *Union of India*, AIR 1964 SC 880: (1964) 3 SCR 191; also see *Rukhmabai* v. *Lala Laxminarayan*, AIR 1960 SC 335: (1960) 2 SCR 253.
73. *Purnanthanchi* v. *T.S. Gopal Swami*, 38 Bom LR 1247 (PC).
74. *Shri Ram* v. *Chauthi*, 1988 All 53; *Krishna* v. *Shivnath*, AIR 1993 AP 65.
75. *Balekrishna* v. *Ram Narayan*, (1903) 30 Cal 738.
76. *Ratneshwari Nandan Singh* v. *Bhagwati Saran Singh*, AIR 1950 FC 142.
77. *Inder Kuer* v. *Pirthipal Kuer*, AIR 1945 PC 128; see also *Yella Papayya* v. *Yella Suryanarayana*, AIR 1947 Mad 426.

but it will raise a presumption of separation and the burden to prove it lies on the person who alleges it.[78]

(*c*) ***Partition by arbitration***.—Parties by an agreement may appoint arbitrators for dividing the joint family property among themselves. This amounts to a severance of the joint status of the family from the date of agreement. That no award by the arbitrator has been made on the reference, is not evidence of renunciation of their intention to separate.[79]

(*d*) ***Partition by registered notice***.—In partition intention to sever is important and this can be manifested by sending a registered notice to other coparceners. It might be followed by a suit or not. If a suit is filed partition will be decreed as on the date of the registered notice. One must note that the intention to separate might be given up explicitly or impliedly at a subsequent stage by an agreement.[80] Similarly, the intention which has not been persisted in or which has been withdrawn or abandoned cannot be treated as effecting a partition.[81] The subsequent withdrawal or abandonment of the intention, however, must be such as to annul a former clear declaration of partition.[82] One must refer to the observations of the Supreme Court in *Raghavamma case* given *ante* for this purpose.

(*e*) ***Partition by Will***.—A coparcener may make a Will and may declare therein an intention, clear and unequivocal, of his desire to separate. He may thus assert his right to separate.[83] For example: "I want to get myself divided and want to execute this Will — these words were held sufficient to effect a separation of status.[84] The validity of the will depends upon the acceptance of this arrangement by other members. It would be effective as a family arrangement and not as a Will.[85] The head of a family cannot effect a partition by Will amongst the various members of the family *inter se*.

Before 17th June, 1956, a coparcener could not make a valid Will which would be effective Will for his coparcenary interest. He could not separate also his interest by his Will.[86] But Section 30 of the HSA now confers a right upon a *Mitakshara* coparcener also to make a testamentary disposition of his interest in the joint family property. Thus now a coparcener may make a valid Will to the effect that his interest should be separated to be donated to a hospital or a library or to a particular person.

(*f*) ***Partition by apostasy***.—When one of the members of a joint Hindu family converts himself to some other religion, e.g. Islam or Christianity, he effects his severance from the joint family. However, this does not operate upon

---

78. *Beti* v. *Shikhdar Singh*, 50 All 186.
79. *Malick Harkishan Singh* v. *Malick Pratap Singh*, 40 Bom LR 1068.
80. *Banke Bihari* v. *Brij Bihari*, 51 All 519.
81. *Gangadharrao Gopalrao* v. *Ramchandra*, AIR 1946 Bom 146, 147.
82. *Darshan Singh* v. *Parbhu Singh*, AIR 1946 All 67.
83. *Kamal Nair* v. *Prabhulal*, 39 All 496 (PC): AIR 1917 PC 39: 44 IA 159.
84. (*Bodenpali Andi*) *Lakshmanna* v. (*Venduri*) *Sree Ramulu*, AIR 1927 Mad 1066.
85. *Harkesh Singh* v. *Hardevi*, 49 All 763.
86. *Raghavamma* v. *Chenchamma*, AIR 1964 SC 136, 147: (1964) 2 SCR 933.

other members *inter se*.[87] Such a convert ceases to be a coparcener from the moment of conversion and no longer possesses the right of survivorship. He takes his share in the family property as it stood at the date of his conversion.[88] If the convert to another religion reconverts to Hinduism, his act of reconversion does not bring about his coparcenary relationship unless his subsequent act or transaction point to a reunion.[89]

(*g*) ***Partition by marriage under the Special Marriage Act.***—The same rules as stated above apply to a coparcener who marries under the Special Marriage Act, i.e. it effects his severance from the joint family.

(*h*) ***Oral partition.***—Partition may be oral. It need not be in writing. Even the Privy Council has subscribed to this view,[90] and the courts are following this view. The rationale behind this principle is that partition does not involve transfer of property as it is in the nature of mutual renunciation of rights. It can be therefore oral.[91]

In *Shivalingappa case*[92] a deed of partition was made. When a deed of partition is made, its registration is advisable or rather necessary. However, if in the deed there is no evidence or writing as to distribution of property by metes and bounds, no registration is necessary. Such a document when made can be used as an evidence of severance of joint family status.

(*i*) ***Partition by institution of a suit.***—The institution of a suit for partition by a coparcener is an instance of a definite and unequivocal indication of his intention to separate and consequently there is a severance of the joint status from the date of institution of the suit, even though the suit is dismissed for want of justification or otherwise.[93] The same view is reiterated by the Kerala High Court in the case of *Hariharan.*[94] A decree passed by the court is necessary only for working out the result of the severance and for allotting definite shares. The status of the plaintiff as separate is brought about by the assertion of his right to separate, whether he obtains the judgment or not. On the plaintiff's death the suit may be continued by his widow or other female heir.

A minor coparcener as well as a major one can go to court for this purpose. The rules in both the cases differ because Law has a soft corner for a minor.

If the suit is withdrawn before it is tried, it gives a sure indication that the plaintiff does not wish to go ahead for partition. Consequently there is no partition. If the suit is withdrawn after the plaintiff's death, no partition takes

---

87. *Khunnilal* v. *Govind*, 38 IA 87: 33 All 356 (PC).
88. *Vella Venkatsubbayya* v. *Vella Venkatrammayya*, ILR 1944 Mad 33; *Kulada Prasad Pandey* v. *Haripada Chatterjee*, 40 Cal 407; *Ram Pergash Singh* v. *Mst. Dahan Bibi*, 3 Pat 152.
89. *Yella Venkatramayya* v. *Yella Seshayya*, AIR 1942 Mad 193.
90. *Rewun Pershad* v. *Radha*, (1846) 4 MIA 137.
91. See *P. Reddiar* v. *Reddi*, AIR 1966 Mad 414. Most of the earlier authorities have been considered in this case.
92. *K.G. Shivalingappa* v. *G.S. Eswarappa*, (2004) 12 SCC 189: AIR 2004 SC 4130.
93. *Phoolchand* v. *Gopal Lal*, AIR 1967 SC 1470; *Syed Kasim* v. *Jawahar Singh*, 49 IA 358: 30 Cal 84 (PC): AIR 1922 PC 353. See also *G. Basappa Hadapad* v. *M. Shankarappa*, (2006) 1 HLR 369 (Kant).
94. *P.G. Hariharan* v. *Padaril*, AIR 1994 Ker 36.

place.[1] Similarly if the suit is proved to be a sham transaction resorted merely to create an evidence of separation, there would be no severance.[2]

A question may be posed for consideration whether a minor through his next friend can file a suit for partition. This brings in a point whether a minor can make up his mind through his next friend to separate, though he is incapable of forming an intention to separate. Up to 1957 there were divergent opinions of High Courts but now the Supreme Court has answered this point finally in *Redasubhayya case*,[3] that such a suit also brings about a division of the joint status. The court observed that what brings about such severance is the very action of the minor's next friend in filing the suit, and the decree merely renders such an act effective, by confirming that what the next friend had done was for the minor's benefit. The power which the court exercises in decreeing or refusing partition at the instance of a minor plaintiff is not in denial but in protection of his right which he undoubtedly has to separate from the joint family if it is in his interest and for his benefit.[4] Where partition is unfair or prejudicial to the minor, he may, on attaining majority, by proper proceeding, set it aside.[5]

A widow of a coparcener under the Hindu Women's Right to Property Act, 1937 has powers to file a suit for partition. If she dies during pendency of the suit, her interest under the Hindu Succession Act, 1956 would devolve upon her own heirs under the section thereof.

The suit in question should be presented in the right court.

(*j*) ***Partition by renunciation.***—By renunciation of his interest a coparcener may effect a separation but the renunciation must be in favour of all the other coparceners and it must relate to the whole joint estate.[6] As held in *Alluri case*,[7] the renunciation by a coparcener merely extinguishes his interest in the estate; it does not affect the status of the remaining members who continue to be coparceners as before.

(*k*) ***Partition by sale by one coparcener to another.***—In Maharashtra, Tamil Nadu and Gujarat when a coparcener sells his undivided interest he becomes divided from them in respect of such property.[8] It must be noted that a son has his share in the ancestral property by birth and he does not claim through his father but he claims in his own right. Therefore, renunciation of the

---

1. *Shanker Singh* v. *Gulab Chand*, ILR 1945 Nag 444.
2. *Bhagwant Kishore* v. *Bishamber Nath*, AIR 1950 All 54.
3. *Redasubhayya* v. *Akkamma*, AIR 1958 SC 1042; also see *Rekapalli* v. *V.R. Suryanarayan Murthy*, ILR 1959 AP 409.
4. *Mandli Prasad* v. *Ramacharanlal*, ILR 1947 Nag 848: AIR 1948 Nag 9.
5. *Balkishen Das* v. *Ram Narain Sahu*, 5 Bom LR 461 (PC): 30 IA 139: 7 CWN 578.
6. *Tulsi* v. *Haji*, AIR 1938 Lah 478.
7. *Alluri* v. *Dantauluri*, 63 IA 397.
8. *Rukhmabai* v. *Laxminarayana*, AIR 1960 SC 335: (1960) 2 SCR 253; *Chaudhury Raghubeer Narayan Singh* v. *State of U.P.*, (1972) 4 SCC 769: AIR 1972 SC 2096.

father of his own share cannot operate as relinquishment of the rights of the sons.[9]

(*l*) ***Partition by any other conduct.***—The Mitakshara school entitles every coparcener to ask for his partition from the joint family at any time. No permission of other coparceners is needed. That the other coparceners wish to remain united is of no moment. His unilateral declaration to enjoy his interest in severalty has a force sufficient to break his tie with his coparcenary.[10] Any transaction having an effect of defining the shares of other coparceners in the property results in partition of joint status. An entry in the Record of Rights showing the share of each member separately is an evidence of division of shares of coparceners in the joint family and constitutes partition.[11]

In *Madanlal* v. *Yoga Bai*[12] the property in question was raised and developed by joint efforts of the father and his sons. It was held that it is a joint family property and is amenable to partition.

(*m*) ***Hindu Succession Act, 1956: Effect of.***—Under Section 6 of the above Act, when a male Hindu dies after the commencement of this Act, having at the time of his death an interest in the Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act, but if he leaves a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property devolves by testamentary or intestate succession, as the case may be, under the Act.

Consequently, if such a male Hindu dies, there will be a partition because his interest will devolve upon his heirs under the Act or upon the legatee of his Will if he has made a Will.

As per Section 30 of the Act, any Hindu may dispose of his interest in the Mitakshara coparcenary property by will. This is his statutory right.

8. What does not bring about partition?

Joint family means a family of which the members live together, have a commonness and residence. They are by custom joint in possession or residence. This is a common understanding. But it may happen that some members live separately and have separate kitchens for their convenience.[13] But they are not partitioned thereby.[14] Thus (1) as separate living is no mark of

---

9. *Karma Singh* v. *Surender Singh*, AIR 1931 Lah 289: 135 IC 180.
10. *Madho Parshad* v. *Mehrban Singh*, (1890) 18 Cal 157; *Pavitri Devi* v. *Darbari Singh*, (1993) 4 SCC 392; see also *A. Raghavamma* v. *A. Chenchamma*, AIR 1964 SC 136: (1964) 2 SCR 933 (*per* Subba Rao, J.); *Puttrangamma* v. *M.S. Ranganna*, AIR 1968 SC 1018: (1968) 3 SCR 119. (*per* Ramaswami J.)
11. *Anuraga Kuer* v. *Darshan Raut*, 40 Bom LR 785 (PC).
12. (2003) 5 SCC 89: AIR 2003 SC 1880.
13. *Purna Bai* v. *Ranchhoddas*, (1992) 2 HLR 655 (AP DB).
14. *Rama Nagappa Mehar* v. *Nagappa Malappa Mehar*, (2006) 1 HLR 479 (Kant); *Hanumath Bheemappa Sanadi* v. *Rudrappa Thammamma Sanadi*, (2006) 1 HLR 814 (Kant).

partition, so (2) alienation by coparcener of his interest in joint family property is also no proof of partition. (3) Mere ascertainment of one's share[15], (4) insolvency of coparcener[16] or (5) notional partition does not bring about the partition. (See Section 6 HSA after its amendment in 2005).

9. Persons entitled to sue for partition

Under both the schools of Hindu law, Dayabhaga school and Mitakshara school, as a general rule every coparcener is entitled to a share on partition but the right to sue for a partition is available only to the following persons:

(*a*) In Maharashtra and Gujarat a *son* is not entitled to sue his father for partition against the will of the father, if the father is joint with his own father, brother or other coparcener. [17]

(*b*) In Punjab, a *son* cannot enforce partition at all during his father's lifetime, whether the father is separate or joint with other coparceners. However, if the father supports the son, the son can enforce partition even against his uncles and other coparceners.[18]

(*c*) A *widow* taking interest in any property, is entitled to claim for partition like a male coparcener.[19]

(*d*) A *minor* can sue for partition if it is for his benefit.

(*e*) A purchaser of a coparcener's undivided coparcenary interest at a sale in execution of a decree can demand partition as also, according to Mumbai and Chennai schools, a purchaser of a coparcener's interest by a private sale.[20]

10. Persons who cannot sue for partition

The following persons cannot sue for partition:

(*a*) Coparceners suffering from congenital lunacy or idiocy. They are excluded from partition. They have only a right to maintenance.

(*b*) Wife, mother or grandmother is not entitled to partition.

(*c*) A minor cannot sue for partition if his interests are likely to be prejudiced by the property being left in the hands of other coparceners.

(*d*) In Mumbai (i.e. Maharashtra) and Gujarat a son cannot enforce partition against the will of his father. Same position prevails in Punjab too.

---

15. *Palami Ammal* v. *Muthuvenkatachala Moriagar*, AIR 1925 PC 49: 6 Bom LR 1: 14 MLJ 8.
16. *Hanumanth Gowd* v. *Official Receiver*, AIR 1946 Mad 503: (1946) 1 Mad LJ 247.
17. *Rai Bishanchand* v. *Asmaida Koer*, 11 IA 164: 6 All 560; *Appaji* v. *Ramachandra*, 16 Bom 29 (FB); *Jivabhai* v. *Vadilal*, 7 Bom LR 232.
18. *Satish Narain* v. *Deoki Nandan*, AIR 1947 Lah 372.
19. *See* Hindu Women's Right to Property Act, 1937 and Hindu Succession Act, 1956, S. 23.
20. *Kailash Pati Devi* v. *Bhubneshwari Devi*, (1985) 1 SCC 405: AIR 1984 SC 1802.

11. Parties necessary to a partition suit

A plaintiff in a suit for partition should implead the following as necessary parties:

(*a*) The heads of all the branches.[21]

(*b*) The wife, widow-mother, widow-grandmother, widow of a deceased coparcener, i.e. females entitled to a share on partition.

(*c*) The purchaser of a coparcener's interest, if any.

(*d*) If the plaintiff himself is a purchaser from a coparcener, his alienor. This includes all persons who are entitled—

(*i*) to demand partition; or

(*ii*) to have a share on partition, including female sharers; or

(*iii*) to have a provision made for his maintenance and marriage; and

(*iv*) alienees of the undivided interest, are necessary parties to a suit for partition.

If any of the parties mentioned above are not joined, the suit may fail. In appropriate cases the court may allow amendment of the plaint.[22]

Besides the above necessary parties, the following are the proper persons whose presence before the court would facilitate adjudication of the suit and settle all questions involved in the suit:[23]

(*i*) Persons entitled to provision for their marriage, e.g. unmarried daughters or sisters.

(*ii*) Persons entitled to maintenance[24] out of the joint family property, e.g. disqualified heirs, illegitimate children, unmarried daughters.

(*iii*) Purchaser of an undivided interest of a coparcener, not being the plaintiff.

(*iv*) Mortgagee of a family property or of the undivided interest of a coparcener.

(*v*) Coparceners not being heads of the branches.

(*vi*) Any other person interested in the family property.

The person enforcing a partition by institution of a suit may not plead his sons as parties because the decree in such a suit binds his sons too, the father or manager fully representing his sons.

12. Special power of a Hindu father to effect partition

The father of a joint Hindu family possesses special power to effect a partition

---

21. *Digamber* v. *Dhanraj*, AIR 1922 Pat 96: 1 Pat 361.
22. *Vide* Or. 1 R. 10, CPC.
23. *Vide* Or. 6 R. 17, and Or. 1 R. 10, CPC.
24. *Balwant Rao* v. *Kerba*, AIR 1953 Hyd 187; *Jotiram Ekoba* v. *Ramchandra Trimbak*, ILR 1941 Bom 638: AIR 1941 Bom 382: 197 IC 788.

between himself and his sons, and also between sons *inter se* even without their consent.[25] This power of father is a part of the *patria potestas* that was recognised by Hindu law.[26] However, the father must act bona fide and should not be unfair to anyone.[27] Unequal or fraudulent partitions can be reopened.[28]

This right is a peculiar one and it is possessed by the father; a grandfather has no such right to effect a partition among his grandsons.

Another peculiar feature of this power is that the father can exercise this right during his lifetime only; he cannot by his will direct a partition among his sons, as his heir, the mother is entitled to demand partition between her sons and receive the share of the deceased son as well as a share in her own right. However there is a contrary view also.

See, chapter on "Joint family"—"Father's special power of disposition".

Such a question of grossly unjust and unfair partial partition came for consideration in *Gurusamy Naicker* v. *G. Jayaraman*[29] by the Chennai High Court. The case is about the gifts made by the Karta of the family to his daughter. The court observed that the Karta had power to effect partition even without the consent of the other coparceners.[30] But if the said power exercised by the father results in unequal and unfair partition, it could be set aside by the affected coparcener. Partition made must therefore be fair and equal.[31] If it is not it is open to the sons, if they are major to repudiate the partition.[32] In *Apoorva Shantilal Shah*,[33] the court observed: " We wish to make it clear that this right of the father to effect a partial partition of joint family properties between himself and his minor sons, whether in exercise of his superior right as father or in exercise of the right as *patria potestas* has necessarily to be exercised bona fide by the father and is subject to the right of the sons to challenge the partition if the partition is not fair and just." The unbridled right of father to effect partition there are three restrictions:

(1) The father can divide his sons only during his lifetime but not by his Will after his death.[34] The testamentary partition will be effective only when all the coparcener sons give their consent thereto.[35]

---

25. *Nirman Bahadur* v. *Fateh Bahadur*, ILR (1930) 52 All 178: AIR 1929 All 963; *Venkat Subaramania* v. *Easwara*, AIR 1966 Mad 266: ILR (1966) 1 Mad 468: (1966) 1 Mad LJ 471; *N. Krishna Reddy* v. *N. Shardabai*, (2002) 2 HLR 61 (AP).
26. *Apoorva Shantilal Shah* v. *CIT*, (1983) 2 SCC 155: AIR 1983 SC 409: 1983 Tax LR 563.
27. *Apoorva Shantilal Shah* v. *CIT*, (1983) 2 SCC 155: AIR 1983 SC 409.
28. *Ibid.*
29. AIR 1996 Mad 212.
30. *Apoorva Shantilal Shah* v. *CIT*, (1983) 2 SCC 155: AIR 1983 SC 409; *Meyyappa* v. *CIT*, AIR 1951 Mad 506; Mulla's: *Hindu Law*, 16th Edn. para 323, p. 379.
31. *Ibid.* see *Kandaswami* v. *Doraiswami Aiyar*, ILR (1878-80) 2 Mad 317 and *Venkatpathi Raju* v. *Venkatanarasimha Raju*, ILR 1937 Mad 1: AIR 1936 PC 264.
32. *Ibid.*
33. (1983) 2 SCC 155: AIR 1983 SC 409.
34. *Samatan* v. *Juggutsoondree Dossee*, (1859-61) 8 MIA 66; *Kallumal Tapeswari Prasad (HUF)* v. *CIT*, (1982) 1 SCC 447: AIR 1982 SC 760.
35. *Brij Raj Singh* v. *Sheodan Singh*, (1913) 40 IA 161: 15 Bom LR 652; *M.N. Aryamurthy* v. *M.D. Subbaraya Setty*, (1972) 4 SCC 1: AIR 1972 SC 1279.

(2) Besides this a father cannot effect partial partition among his sons without their consent.[36]

(3) The allocation of property must not be unfair and unequal. He should not favour one son over the other. If the father play a mischief and it penetrates the whole scheme of the division, a reopening of the whole partition is required.[37]

13. Son's right to sue his father for partition

As decided by the Mumbai High Court in *Appaji* v. *Ramachandra*,[38] (by majority),[39] a son is not entitled in the lifetime of his father and uncles for a partition if the father does not assent thereto.

In Punjab also a son cannot enforce a partition during his father's lifetime, according to custom.[40] For example, a joint family consists of *A*, *B* and *C*. *A* is *C*'s father and *B* is *C*'s uncle. Can *C* sue *A* and *B* for partition? The answer is that according to the Mumbai and Punjab High Courts *C* cannot sue for partition but according to other High Courts, he can.

In case of unfair or prejudicial partition, a minor on his attaining majority, set it aside by proper proceedings.[41]

14. Births and deaths in family: Effect on partition

Births and deaths in a joint Hindu family have their own effect in the form of decrease and increase in the respective shares of its members. When a suit is instituted for partition it has the effect of severing the joint status of the family. The suing coparcener's share therefore is not liable to be diminished by birth of another member of the family subsequent to the date of the suit as the latter is not to be counted for a share. Similarly, the share is not augmented by death of any of the members subsequent to that date as it passes to his (the deceased's) heirs.[42] Such heirs are therefore entitled to prosecute the suit for partition.

When a suit is brought by a minor as a sole plaintiff or as a co-plaintiff with the adult, the position is, according to the Chennai and the Mumbai High Courts, that the mere institution of a suit does not have the effect of a severance of the joint status. However, if a decree is passed in the suit the partition takes effect from the date of the suit and a minor's share will not be affected by births and deaths in the family, subsequent to that date. But, if the court refuses to decree a separation in respect of a minor, his share will be affected by subsequent births and deaths, i.e. it will increase by subsequent deaths.[43]

---

36. *CIT* v. *Seth Gopaldas (HUF)*, 1980 HLR 733 (MP).
37. *Venkatasubramania* v. *Easwara*, AIR 1966 Mad 266: ILR (1966) 1 Mad 468: (1966) 1 Mad LJ 471.
38. 16 Bom 29 (FB).
39. Justice Telang *dissenting*.
40. *Satish Narain* v. *Deoki Nandan*, AIR 1947 Lah 372.
41. *Balkishan Das* v. *Ram Narain Sahu*, (1903) 30 IA 139: (1903) 30 Cal 738.
42. *Girja Bai* v. *Sadashiv*, AIR 1916 PC 104: (1916) 43 IA 151.
43. *Ganpathi* v. *Subramaniam*, AIR 1929 Mad 738: 52 Mad 845.

The Patna High Court holds a contrary view.

15. Sons born subsequently

A son who is born after partition might be one (*i*) who was begotten earlier but born subsequently or might be one; (*ii*) who was begotten as well as born subsequently. In the former case the rights which had accrued to him in the coparcenary property on his conception will not be prejudiced. Therefore, if at the time of partition no share has been reserved for him, it is his right to reopen the partition and have a share allotted to him.[44] In the subsequent case his rights depend on whether his father had taken a share for him or not at the time of partition.[45]

In case the father had taken a share for the son, the son cannot reopen the partition but he can succeed to the property allotted to the father and to all the self-acquisitions of the father to the exclusion of the separated sons. Similarly, the fact that the father had squandered the property he received on partition will provide no ground to the son born subsequently to reopen the partition.

Example: A coparcenary consists of a father *A*, and his two sons *B* and *C*. A partition is effected and the father does not take any share and the coparcenary property is divided between *B* and *C*. After partition a son *D* is born to *A*, and a son *E* is born to *B*. The question is can *D* or *E* have the partition reopened?

If we apply the rule stated above, *D* is a son who is begotten and born after partition. The father, as is stated, has taken no share (on partition) for himself. *D* can therefore, demand to reopen the partition and have the share allotted to him. But *E* (*B*'s son) has no such right and he cannot reopen the partition.

16. Persons entitled to a share

(*a*) *Males*.—(*i*) *Coparceners*[46].—Every coparcener is entitled to a share on partition,[47] unless he is disqualified for it. One must note, however, that every coparcener does not have an unqualified right to enforce a partition or to sue for partition.

(*ii*) *Sons*.—All coparceners who are adults can sue for and enforce a partition. In Maharashtra and Gujarat a son is not entitled to sue his father for partition against the will of the father, if the father is joint with his own father, brother or other coparceners.[48] Other High Courts do not recognise any such exception and hold that the son, the grandson or great-grandson can claim partition of the joint family property even against the latter's will and without

---

44. *Jagat Krishna Das* v. *Ajit Kumar Das*, AIR 1964 Ori 75.
45. *Changma* v. *Muniswami*, 20 Mad 75.
46. Reader may profitable refer to Law Commission's recommendations in its 174th Report, the gist whereof is given in Chapter III in para 5 at (*h*).
47. *Sartaj Kauri* v. *Deoraj Kauri*, 15 IA 51: 10 All 272 (PC).
48. *Appaji* v. *Ramachandra*, 16 Bom 29 (FB); *Jivabhai* v. *Vadilal*, 7 Bom LR 232; *Rai Bishanchand* v. *Asmaida Koer*, 11 IA 164: 6 All 560.

his consent. In Punjab[49] also the position is the same as it is in Gujarat and Maharashtra.

(*iii*) *Minor sons*.—Minority as such is no bar to claiming a partition. A minor can sue for partition through his next friend and, as held by the Supreme Court, the court can pass a decree if it is satisfied that in doing so the next friend is acting in the benefit and interest of the minor.[50] If the court is not satisfied, it can refuse a decree. In *Appalaswami case*,[51] the facts were that the father had two minor sons by his first wife. The father and his two minor sons did not have good relations. A suit for partition was brought and the father had two more sons by his second wife. It was held that the fact of having two more sons was no ground for holding that the partition was in the interest of the minors. A minor coparcener's presence does not prevent others from seeking partition.[52]

(*iv*) *Sons by a marriage with a woman of a different caste*.—Hindu law recognizes a distinction between the above two types of sons for sharing the patrimony. Such considerations have now ceased to exist due to statutory provisions. Now the policy of the codified law is to treat all sons alike.

(*v*) *Adopted sons*.—The position of an adopted son is similar to that of a natural son, even if there is a natural son born after the partition. The shares of these two types of sons differed previously according to different schools, i.e. the adopted sons received a lesser share than that of the natural son, say—

(*i*) 1/3rd of the adoptive father's estate in Bengal;

(*ii*) 1/4th of the adoptive father's estate in Benaras; and

(*iii*) 1/5th of the adoptive father's estate in Chennai, Maharashtra and Gujarat.

It must however be remembered that the effect of Section 12 of the Hindu Adoptions and Maintenance Act, 1956 and of Sections 6 and 8 of the Hindu Succession Act, 1956 is to place now the adopted son on a footing of equality with the other sons in the matter of sharing the patrimony.

(*vi*) *Sons born subsequently* (*after-born sons*).—After-born sons fall into two categories:

(*i*) A son begotten at the time of partition, i.e. in the womb of his mother at the time of partition but born after the partition; and

(*ii*) A son begotten as well as born after the partition.

For category number one the rule is that a son who was in his mother's womb at the time of partition is entitled to a share as if he was in existence at the time of partition, though in fact he was born after the partition.

---

49. *Punjab National Bank* v. *Jagdish*, AIR 1936 Lah 390.
50. *Kakumanu Pedasubhaya* v. *Kakumanu Akkamma*, AIR 1958 SC 1042.
51. *Appalaswami* v. *Suryanarayanamurthi*, ILR 1948 Mad 440 (PC).
52. *Raghunath* v. *Ramakant Tiwari*, AIR 1991 Pat 145.

As regards category number two the rule is that the right of such a son depends on whether or not the father had reserved to himself a share when the partition took place. If such a share is reserved, he cannot get the partition reopened.

(*vii*) *Illegitimate sons.*—According to old Hindu notions illegitimate sons (sons by a concubine or a Dasi) of a Brahmin, Kshatriya and Vaishya castes were not entitled at any time to inheritance or to any share on partition. An illegitimate son of a Hindu male may be by a concubine who is either a Dasi or who may not be a Dasi. A Dasi is in the exclusive and continuous keeping of a Hindu male. An illegitimate son of a male Hindu by a Dasi is called a Dasiputra. Illegitimate sons could only claim maintenance.

As observed by the Supreme Court in *Gur Narain Das case*,[53] among the Sudras though such a son had no right by birth in the putative father's property, nor any right to partition against the father, he was nevertheless entitled to claim partition after his father's death as against the legitimate son of the father in case the father had died divided from his collaterals. In the case of partition between these two types of sons, i.e. legitimate and illegitimate, the illegitimate son would acquire 1/4th and the legitimate sons 3/4ths of the property.[54] After the passing of the Hindu Succession Act, 1956, the father's undivided interest in Mitakshara coparcenary property will devolve in the manner shown in the proviso to Section 6 of the Act.

One may succinctly present the rights of a Dasiputra as under:

(*a*) Dasiputra cannot acquire interest by birth in his father's property. He cannot therefore enforce a partition during the life of his father.

(*b*) After his father's death he succeeds to his father's estate as a coparcener with the father's legitimate sons and consequently he can enforce a partition against the legitimate sons.

(*c*) While a partition is effected between these sons he takes only 1/2 of what he would have taken if he was legitimate. Thus in effect where a legitimate son is entitled to 3/4ths, the illegitimate one takes only 1/4th.[55]

(*d*) When the father of an illegitimate son is joint with his collaterals, i.e. his brothers and their sons and he (the father) dies, the illegitimate son has no right to demand partition of the joint family property; he is only entitled to maintenance out of such property.

(*viii*) *Disqualified coparceners.*—Under early Hindu law a coparcener suffering from any disability could not claim a share on partition; he was only entitled to maintenance.[56] There were many grounds of disabilities mentioned in

53. *Gur Narain Das* v. *Gur Tahal Das*, AIR 1952 SC 225: 1952 SCR 869.
54. *Ibid.*, also see *Kamulamma* v. *Vishwanathswami*, AIR 1923 PC 8: ILR 1946 Mad 167.
55. *Kamulamma Vishwanathaswami*, AIR 1923 PC 8: ILR 1946 Mad 167.
56. *Rama Sahaye* v. *Lalla*, ILR (1881) 8 Cal 149.

the Shastras.[57] However, such persons could represent their branch and receive the share allotted to the branch. The Hindu Inheritance (Removal of Disabilities) Act, 1928, Section 2 debarred only a lunatic by birth or an idiot from inheritance. The Act was not retrospective and it did not apply to the Dayabhaga school. Now under the Hindu Succession Act, no person is disqualified from inheriting as heir by reason of any physical or mental disability.[58]

(*ix*) *Absent or missing coparcener.*—Such coparceners will be represented by their issues. They stand on the same footing as a minor. Their right to receive a share extends to their descendants.

Of course, the absence of a coparcener at the time of partition cannot prevent or delay a partition. However, if no share is allotted to an absent coparcener or an unfair or unequal share is allotted to an absent coparcener, on his return, the absent coparcener can reopen the partition. His filing an action for reopening the partition is subject to the law of limitation.[59]

(*b*) ***Females: General.***—Female sharers who are entitled to a share on partition are the wife, and the widowed mother or the stepmother. The great-grandmothers, according to some commentators are entitled to a share on partition. Females, of course, are not entitled to enforce a partition.[60] Their right to receive shares arises only on partition having been actually made. In other words, they have no pre-existing right in the joint family property except a right to maintenance. Here also their right was a limited one. However it must be remembered that under the Hindu Women's Right to Property Act, 1937[61] a widow of a deceased coparcener has the same right of claiming a partition as a male owner. The Act thus enlarges the class of female sharers by including therein all the widows of deceased coparceners. Each widow would get on partition the share which her husband would have taken, if he were alive even though she may not stand in the relation of a mother or a grandmother to the separating male coparceners.

Now under the Hindu Succession Act, 1956[62] property obtained by a female on partition becomes her absolute property.

The terms "mother", "grandmother" and "great-grandmother" include a "step-mother", "step-grandmother" and "step-great-grandmother".

(*i*) *Wife.*—A wife cannot demand partition[63] and on partition between the father and his sons the wife takes a share equal to that of a son even if the son be her stepson. If there are more wives than one each will be entitled to a share equal to that of a son. The wife can enjoy her share separately even from her

---

57. *Yagnavalkya* II, pp. 141-143.
58. S. 28, Hindu Succession Act, 1956.
59. *Krishna* v. *Swami*, ILR (1886) 9 Mad 64.
60. *Punna Bibi* v. *Radha Kissan*, ILR (1904) 31 Cal 476.
61. S. 3.
62. S. 14.
63. *Punna Bibi* v. *Radha Kissan*, ILR (1904) 31 Cal 476.

husband.[64] If no share was allotted to her she can reopen partition. As held by the Nagpur High Court the title of the wife to her share gets crystallized (i.e. she becomes the owner of the share) in case of a division between her husband and sons by metes and bounds[65] and the fact that she did not divide her share from her husband's share is immaterial.[66] While computing the wife's share the value of any property given to her as Stridhana by her husband or by her father-in-law can be taken into account.

Before the passing of the Hindu Succession Act, 1956, the share allotted to the wife on partition was not her Stridhana, but stood on the same footing as property inherited by her from her husband.[67] In other words she took only a limited interest in it and on her death it passed not to her Stridhana heirs but to the sons or grandsons. But now, in view of Section 14 of the Hindu Succession Act, 1956, such share becomes her absolute property and she becomes the full owner thereof as also in the case of property inherited from her husband.[68]

(*ii*) *Mother.*—After the death of the father when a partition takes place between sons the mother is entitled to a share equal to that of a son. This right to receive share accrues only when partition by metes and bounds is actually made.

In the case of a mother also (as was in the case of a wife, above) the value of any Stridhana property received by her from her husband or father-in-law should be included in her share.

In case where there are two or more widows, the property shall first be divided into as many shares as there are sons and then each widow shall be allotted a share equal to that of each of her sons in the aggregate portion allotted to them.[69]

After the 17th of June, 1956, i.e. after the passing of the Hindu Succession Act, 1956 the mother (widow) would be entitled to inherit the interest of her deceased husband in the joint family property simultaneously with the other heirs mentioned in Class I of the Schedule to the Act.[70] However, a person who has separated himself from the coparcenary before the death of the deceased (or any of such person's heirs) shall not be entitled to claim a share in the interest of the deceased.[71] For the said purposes the interest of the deceased husband shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death. It appears that, besides the said share allotted to her, the mother widow would also

---

64. *Jagat Krishan Das* v. *Ajit Kumar Das*, AIR 1964 Ori 75; *Hushensab Rajesab Alabaxar* v. *Basappa Puradappa Hallikeri*, 34 Bom LR 1325; *Hosbanna Devanna Naik* v. *Devanna Sannappa Naik*, 48 Bom 468.
65. *Pratapmull Agarwalla* v. *Bhanbati Bibi*, AIR 1936 PC 20: 63 IA 33: 63 Cal 691 (PC).
66. *Nanuram Aiden Maheshri* v. *Radhabai*, AIR 1940 Nag 241.
67. *Debi Mangal Prasad* v. *Mahadeo Prasad*, 39 IA 121: 34 All 334 (PC).
68. *Gopal Narain* v. *D.P. Goenka*, AIR 1971 Del 61; *Saheb Rai* v. *Shafiq Ahmed*, AIR 1927 PC 101. *See* P.N. Chadha: *Hindu Law*, 4th Edn., 1974, pp. 374, 375.
69. *Kristo Bhabinay* v. *Ashutosh*, ILR (1886) 13 Cal 39.
70. *See* proviso to S. 6, Hindu Succession Act, 1956.
71. See Explanation II of S. 6, Hindu Succession Act, 1956.

be entitled to share equally with the sons in the remaining joint family property. She now takes as an absolute owner under Section 14 of the Hindu Succession Act, 1956 and not as a limited owner.[72]

(*iii*) *Grandmother.*—In case of partition between the grandmother's son's sons, (her own sons being dead) she is entitled to a share equal to that of a son's son.

When there is a partition between her sons and the sons of a deceased son, the grandmother takes a share equal to that of a son.

On a partition that takes place between her son and his sons, she is not entitled to a share as per the opinion of the Allahabad and Mumbai High Courts; a different view is however held by the Calcutta and Patna High Courts.

(*iv*) *Unmarried daughters.*—During the lifetime of the father, when a partition takes place, the daughters have no right to have any share. The father is bound to maintain daughters. He is also bound to defray their marriage expenses. Daughters, till their marriage, continue to remain under the father's protection.

(*c*) ***Purchaser from coparcener.***—A person purchasing the undivided interest of a coparcener at a sale in execution of a decree against him is entitled to demand partition. Such a purchase can be made privately and the purchaser (in Chennai, Mumbai and M.P. only) can demand partition. In Bengal and U.P. a coparcener cannot alienate at all. A coparcener cannot make a gift of his undivided interest. However by means of a devise of his interest as mentioned under Section 30 of the Hindu Succession Act, 1956, such interest could be given and the devisee can sue for partition.

17. Allotment of shares[73]

General.—Out of the assets available for partition, after providing for marriage expenses,[74] maintenance, father's debts[75] and funeral expenses the residue of the property will be divided as follows according to the rules governing allotment of shares among the different members:

In a partition between a father and his sons each son has a right to have a share equal to his father. Inequality of shares should not be equated with "Jyesthabhaga" so as to afford a ground for impeaching a partition deed otherwise valid.[76] In a case wherein there is a partition between brothers they will have equal shares. Where there are several fathers and sons, each branch takes *per stirpes* (i.e. according to a branch) with reference to the other branch. Within each branch sharing will be *per capita* (according to an individual). The

---

72. *See also* for details, P.N. Chadha: *Hindu Law*, 4th Edn., (1984), pp. 374-379.
73. *See* P.N. Chadha: *Hindu Law*, (1974), Chap. XIV; M.D. Manek: *Handbook of Hindu Law*, 8th Edn., (1955), Chap. 8.
74. *Chandra Kishore* v. *Nanak Chand*, AIR 1975 Del 175; *Sarkar Narayan* v. *Official Receiver*, AIR 1977 Mad 171.
75. *K.V. Narayanan* v. *K.V. Ranganandhan*, (1977) 1 SCC 244.
76. *Hare Krishna* v. *Bhagirathi*, AIR 1975 Ori 97.

following example would make the point clear: There is a joint family consisting of *P*, the ancestor and his two sons *A* and *B*. Now *A* has one son *C* and *B* has three sons *D*, *E* and *F*. On partition between the father *P* and his sons, the properties in the first instance will be divided *per stirpes*, i.e. *P*, *A* and his branch and *B* and his branch. These are divisions *per stirpes*.

Now property allotted to *A*'s branch will be divided equally between *A* and his son *C*, and the property allotted to *B*'s branch will be divided equally between *B*, *D*, *E* and *F*. In consequence thereof *P* receives 1/3rd, *A* receives 1/6th, *C* receives 1/6th, and *B*, *D*, *E* and *F* will each receive 1/12th (i.e. 1/3rd x 1/4th).

The ordinary rule is to make partition according to the condition of the family as on the date of the suit. If some of the members of the family have separated before and the others effect a partition on a subsequent date regard must be had to the condition of the family on the date of second partition. The Bombay High Court follows this rule but the Madras High Court says that regard must be had to the shares allotted on the first partition in computing the shares allotted on subsequent partition.

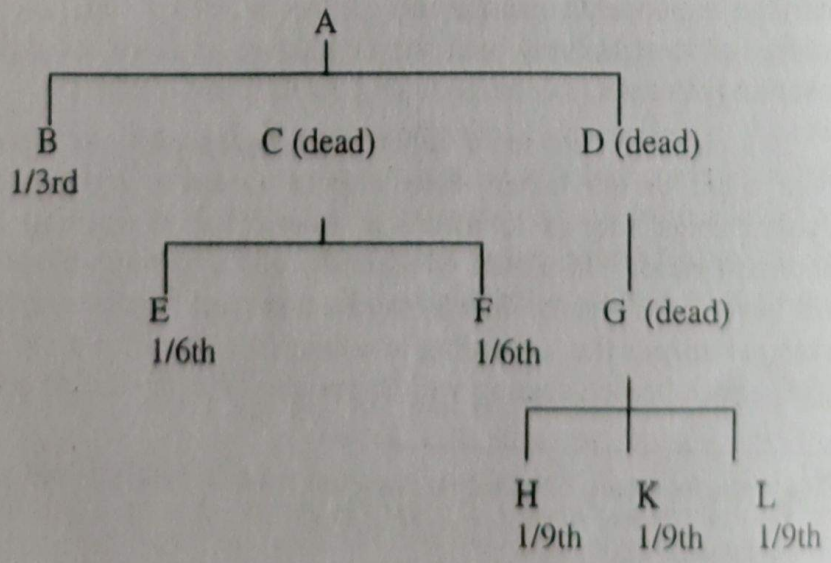
The above position can be reduced into the following rules:

Rule (*i*).—Each branch takes *per stirpes* according to branches as regards every other branch and the members of each branch take *per capita* (according to an individual), whether they are by the same wife or by different wives.[77]

Illustration

This will be clear from the following illustration:

A is a male Hindu. He dies leaving a son *B*, two grandsons *E* and *F* and three grandsons *H*, *K* and *L*. What would be the share of each individual on partition among them? The above, reduced to a table would be like this:



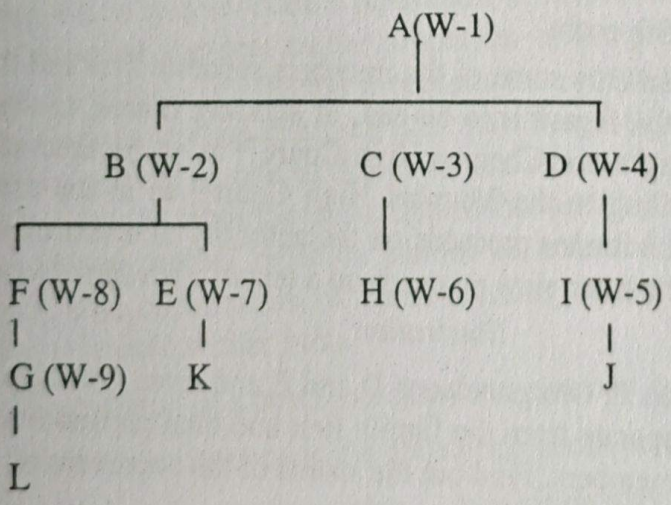
77. *See* P.N. Chadha: *Hindu Law*, (1974), (1978, with supplement), Chap. XIV; S. Venkatraman: *Hindu Law*, (1972), Chap. VI: M.D. Manek: *Handbook of Hindu Law*, 8th Edn., (1955), Chap. 8.

Here first of all the property would be divided into three parts, i.e *per stirpes* as there are three branches. *B* will take 1/3rd, *E* and *F* together will take 1/3rd and *H*, *K* and *L* will together take 1/3rd. *E* and *F* will then take 1/2 of 1/3rd, i.e. 1/6th and similarly *H*, *K* and *L* though they may be by different wives will each take 1/3rd of 1/3rd i.e. 1/9th each. This subdivision made is called subdivision individualwise, i.e. *per capita*.

Rule (*ii*).—On a partition between a father and his sons, the property would be divided equally among the father, the sons (whether by the same mother or different mothers) and their mother or mothers. Here the share of a deceased son would pass to his widow and male issues, provided they are within the limits of the coparcenary.

Illustration

A inherits property from his father. *A* has 3 sons *B*, *C* and *D*, grandsons *E*, *F*, *H* and *I*, great-grandsons *G*, *K* and *J* and a great-great-grandson *L*. Wives of *B*, *C*, *D*, *I*, *H*, *E*, *F* and *G* are represented by W-1 to W-9 respectively. Find out their respective shares on partition among them.



A gets 1/5th, W-1 gets 1/5th.

B gets 1/4th of 1/5th, i.e. 1/20th.

W-2 gets 1/4th of 1/5th, i.e. 1/20th.

F and W-8 get 1/3rd of 1/20th, i.e. 1/60th each.

G, L and W-9 get 1/3rd of 1/60th, i.e. 1/180th each.

E and W-7 get 1/60th each.

K gets 1/60th.

C and W-3 and H get 1/3th of 1/5th, i.e. 1/15th each.

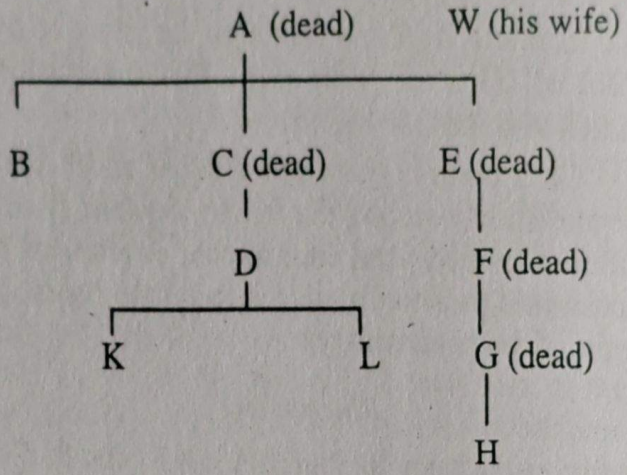
D, W-4 and I get 1/3rd of 1/5th, i.e. 1/15th each.

I, W-5 and J get 1/3rd of 1/15th, i.e. 1/45th each.

Rule (*iii*).—In cases wherein the father is dead the property must be divided equally among the brothers and their mother (or mothers together) if alive. The share of a deceased brother will pass to his widow and his male issue, if any, provided they are within the limits of the coparcenary.

Illustration

A dies leaving a widow *W*, a son *B*, a grandson *D*, great-grandsons *K* and *L* and a great-great-grandson *H*. Find out the shares of each.



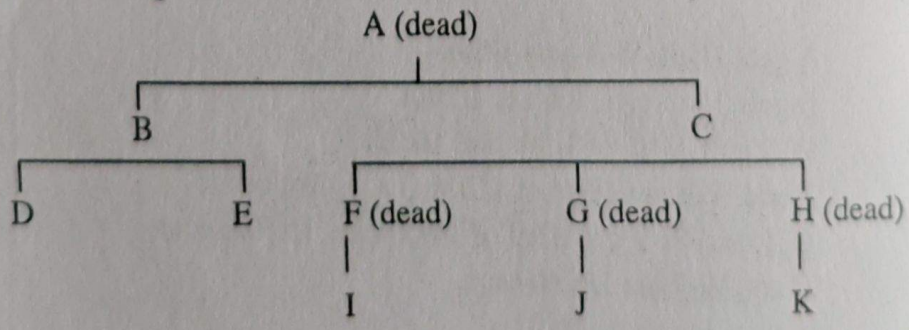
Here, as *H* is removed three degrees from *A*, he will not be an heir of *A* and the division of property will take place as follows:

A's wife shall get 1/3rd, *B* and *D* shall get 1/3rd, 1/3rd of 1/3rd each and *K* and *L* shall get 1/9th, 1/9th each.

Rule (*iv*).—When only some of the members separate first and the others separate subsequently, regard is to be had, in allotting shares, to the state of the family, according to the Chennai High Court,[78] as at the time of the first partition and according to the Mumbai High Court[79] as at the time of the second partition. The former proceeds on the authority of a text of the *Smriti Chandrika*, while the latter view proceeds on a text of *Vyavahar Mayukh*.

Illustration

A dies leaving a son *B*, two grandsons *D* and *E* and three great-grandsons *I*, *J* and *K*. *D*, *J* and *K* separate from the family first and then partition takes place among the remaining members. Find out the shares of the coparceners.



On the first partial partition.—*D* shall get 1/3rd of 1/2, i.e. 1/6th share and *J* and *K* shall each get 1/3rd of 1/2, i.e. 1/6th share; and the remaining coparceners shall get 1/2 of the remaining 1/2 property.

---

78. *Narayan Sa* v. *Shankar Sa*, ILR (1929) 53 Mad 1: AIR 1929 Mad 865 (FB).
79. *Pranjivan* v. *Ichcharam*, ILR (1915) 39 Bom 734: AIR 1915 Bom 255.

On the subsequent complete partition.—According to the Mumbai High Court.—*E* and *B* shall get 1/2 of 1/2, i.e. 1/4th and *I* shall get 1/2.

According to the Chennai High Court.—*E* and *B* shall each get 1/3 of 1/2 x 2, i.e. 1/3rd and *I* shall also get 1/3rd of 1/2 x 2, i.e. 1/3rd.

18. Partial partition

A partition according to Hindu law must be complete as regards the properties of the family and as regards parties entitled to a share on partition. As observed by the Mumbai High Court in *Gurna Ditta case*[80], "the ordinary rule undoubtedly is that there cannot be a partial partition, but it has been held that the rule is elastic, and has in several cases been departed from, if there is no inconvenience in a partial partition, apart from a final partition of the whole of the joint properties".

Consequently a partition, by a mutual or private agreement of the parties may be partial.[81] In *Ramalinga case*[82] the Judicial Committee of the Privy Council recognised that "it is open to the members of the Hindu joint family to make division and severance of interest in respect of a part of the joint estate, while retaining the rest as the properties of the joint and undivided family". Where a partition is effected a presumption arises that all the joint properties were divided. Anyone claiming after partition that certain items of property in exclusive control of one of the members was really joint property, must prove his allegation to rebut the presumption that all the joint properties were divided earlier. But a partial partition cannot be enforced by a suit by a coparcener against other coparceners. A member suing for partition must bring in all the property situated within India.[83]

The partition of a purchaser from a coparcener is different.

There are exceptions to the above rule about partition.

(*a*) ***Types of partial partition.***—A partition may be partial—

(*i*) as to the property, or

(*ii*) as to the person separating.[84]

Whether partition is total or partial is to be proved by the decree of the court passed in the matter, or by agreement between the coparceners or their conduct.[85]

(*b*) ***When a suit for partial partition can be maintained.***—A suit for partition should ordinarily embrace all the joint family properties that may be in a coparcener's own possession, whether within or without the local jurisdiction

---

80. *Gurna Ditta* v. *Ram Ditta*, 30 Bom LR 1384.
81. *Jagmohan Lakhmichand* v. *Ranchoddas*, AIR 1946 Nag 84; *Purushottam* v. *Atmaram*, 23 Bom 597.
82. *Ramalinga* v. *Narayana*, (1922) 49 IA 168: ILR 45 Mad 489: AIR 1922 PC 201.
83. *Hari* v. *Ganpatrao*, 7 Bom 272.
84. *Approvier* v. *Rama Subba Aiyar*, (1886) 11 MIA 75.
85. *Palani Ammal* v. *Muthuvenkatachela Moniagar*, AIR 1925 PC 49: 52 IA 83: 87 IC 333.

of the court, provided the properties are situated within India. To this general rule there are certain exceptions as laid down by the Mumbai High Court in *Hari* v. *Ganpatrao*.[86]

When a suit for partition is filed by a coparcener that suit need not be for the whole property when—

(*a*) Property situated within different jurisdictions: In case where different portions of the property are situated in and out of India,[87] i.e. within different jurisdictions.

(*b*) Property excluded through accident, fraud or mistake: In case where property was excluded through mistake, accident or fraud at the time when the previous partition was effected, or

(*c*) Property held with outsiders: In case where the said property is held by the joint family in partnership with outsiders who do not have any interest in the partition and who, therefore, could not be made parties to the partition,[88] or

(*d*) Property in possession of a mortgagee, etc.: Where the property is in the possession of a mortgagee or where it is Inam land requiring permission of the Government to give jurisdiction to the court.

(*e*) Where the excluded portion is set apart for the maintenance of a widow, or

(*f*) Where the excluded item is impartible property.

In the above situations a suit for partial partition will lie.

(*c*) ***Partial partition as regards property***.—As held by the Supreme Court of India in *Kashinath Pamosa case*[89] it is open to the members of a joint Hindu family to divide a part of the joint family property, while retaining the status of a joint family, and holding the rest as the properties of a joint and undivided family. Once there is sufficient evidence before the court to satisfy it that the parties intended to separate, the joint family status comes to an end and with regard to the undivided portion of the property it loses its joint nature and there comes into play a presumption that the members hold the property as tenants-in-common unless and until it is proved that there is a special agreement to hold it as joint tenants.[90] Once a partition is proved it would be a complete partition, both as regards the persons as well as the properties. This presumption is, however, rebuttable.[91]

---

86. 7 Bom 272.
87. *Ramacharya* v. *Ananthacharya*, 18 Bom 389.
88. *Purushottam* v. *Atmaram*, 23 Bom 597.
89. *Kashinathsa Yamosa Kabadi* v. *Narsingsa Bhaskarsa*, AIR 1961 SC 1077; *Ramalinga* v. *Narayana* (1922) 49 IA 168.
90. *Beni Pershad* v. *Gurudevi*, 4 Lah 252; *Dagadu* v. *Sakhubai*, 47 Bom 773.
91. *Deviah* v. *Karigowda*, ILR 1954 Mys 639: AIR 1954 Mys 128.

In the case of *Gurusami*[92] the person demanding partition claimed one item of property to be joint property. In this case the father made a gift of a portion of the property to his daughter and the son claimed that the gift was not valid in law. Peculiarly the father and the mother did not examine themselves. The court held that by doing so the parents withheld the best evidence and consequently an adverse presumption could be raised against them. The court further observed that a partition, wherein evidence is disclosed that it was partial and grossly unfair and unjust to a coparcener seeking partition, would not be binding on that coparcener.

(*d*) ***Partial partition as regards persons.***—As said before, a partition may be partial as regards property as well as persons. When one only or more of the coparceners separate from the family and there is no general partition amongst all the members there is a case of partial partition.

When such a situation arises there emerges a question whether the remaining coparceners are to be deemed as *joint* or *reunited* or *separate*. In a number of Privy Council and Supreme Court judgments this question has been considered. They lay down the following principles which may be termed as presumptions:

(*a*) The first general principle is that every Hindu family is presumed to be joint unless and until the contrary is proved. Of course, when one of the members has separated himself from others, this presumption will come to an end.

(*b*) When once it is proved that one member of the joint family has separated himself from others, there is no presumption that the remaining coparceners remain united. "An agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact."[93]

For this purpose no express agreement is necessary; only an intention to remain joint is necessary and that could be inferred from their conduct indicating that intention.[94]

The above principles have been approved by the Supreme Court of India in *Bhagwati Prasad case*[95].

(*c*) In case of separation between the members of a joint Hindu family there is no presumption that there was also a separation between one of the members and his descendants.[96]

---

92. *Gurusami Naicker* v. *Jayaraman*, AIR 1996 Mad 212.
93. *Bal Krishna* v. *Ram Krishna*, 53 All 300; *Ram Narayan* v. *Makhana*, 44 Bom LR 1136 (PC); *Balabux* v. *Rukmabai*, (1903) 30 IA 130.
94. *Palani Ammal* v. *Muthu Venkatacharla*, 52 IA 83; *Ram Persad Singh* v. *Lakhpati Koer*, 30 IA 1.
95. *Bhagwati Prasad Sah* v. *Rameshwari Kuer*, AIR 1952 SC 72: 1951 SCR 603.
96. *Hari Bakhsh* v. *Babu Lal*, (1923-24) 51 IA 163.

(*d*) As held by the High Court of Chennai[1] a Hindu father may separate from his sons and the sons may remain joint. Similarly the father may separate from the sons of one wife and may remain joint with sons by another wife. Here also, it is their intention to remain joint which has to be proved like other facts.

(*e*) Where a decree for partition is passed and the question that arises is whether the separation effected was only a separation by the plaintiff from his coparceners or it was a separation of all the members of the joint family from each other, the decree alone should be looked into to determine the question.[2] Where the decree does not supply the answer it cannot be conclusively said that they remained joint. And, in order to determine whether they remained joint or not, the conduct of the parties subsequent to the decree must be looked into.[3]

(*f*) When a member of a joint Hindu family renunciates his interest in the family property it does not lead to a presumption that the other members are separated.

The Supreme Court of India in *K.T. Prasad case*[4] has reiterated the following basic principles of partition and partial partition:

(*a*) It is presumed that where there is a partition it is a total one, both as to parties and property.

(*b*) In case of partition between brothers there is no presumption that there has also been a partition between one of them and his descendants.

(*c*) One who alleges that there is a partial partition (either as to persons or as to property) must prove it.

(*d*) Hindu law does not require that in every case of partition the property should be divided by metes and bounds.

(*e*) A coparcener's declaration of intention to separate brings about a severance of the joint family status and the parties may thenceforth enjoy their respective shares as tenants-in-common.

A subsequent suit for partition of the remaining joint family property is not barred by the principle of *res judicata* because claims for partition are separate causes of action in regard to several properties.

19. Reopening partition

As laid down by Manu:[5] "Once is a partition made, once is a damsel given in marriage, once does a man say, 'I give.' These three are by good men done

---

1. *Sengoda Goundan* v. *Muthu Goundan*, 47 Mad 567.
2. *Palani Ammal* v. *Muthuven Katacharla*, (1925) 52 IA 83.
3. *Ram Narayan* v. *Makhna*, 44 Bom LR 1136 (PC).
4. *Kallomal Tapeswari Prasad (HUF)* v. *CIT*, (1982) 1 SCC 447.
5. *Suryadevara Pullaya* v. *Suryadevara Suryanarayan*, (2001) 3 HLR 326 (AP): See Manu, IX: 47.

once for all and irrevocably." Thus partition once made cannot be reopened except in the following ten cases:

(*a*) *A son begotten before partition*: A son begotten though not born before partition has a right to reopen the partition if on partition a share is not reserved for him.[6]

(*b*) *A son begotten as well as born after partition*: A son begotten as well as born after partition can make a demand for reopening the partition if his father, though he was entitled to take a share on partition has not reserved a share for himself.[7]

(*c*) *A son adopted by a widow*: A son adopted by a widow of a deceased coparcener has every right to reopen a partition effected by the surviving coparceners after the death of his adoptive father and before his own adoption.[8]

(*d*) *A disqualified coparcener*: A disqualified coparcener can reopen the partition on removal of his disqualification.[9]

(*e*) *Minority of the applicant*: When a partition made during the minority of the applicant was unfair and prejudicial to his interest,[10] he can, on attaining majority get the partition reopened. To this proposition there is an exception that if such a partition was effected by a decree of a court before which the minor was properly represented, the partition cannot be reopened.

The Supreme Court of India in *Sukhrani case*[11] approving and reaffirming the principles laid down in *Ratnam Chettiar case*[12], observed that a partition which was unfair or prejudicial to the minor's interest could be reopened at the minor's instance even though there was no fraud or misrepresentation or undue influence. In such cases it is not necessary to reopen the entire partition but only a distinct and separable part of the scheme of partition could be reopened. However, apart from the above argument of unfair and prejudicial partition, if the division made at the partition was unequal,[13] that by itself would not justify reopening the partition.

A partition effected by a decree of a court (as said before) is as much binding on the minor as on the adult party; however, if the minor can

---

6. *Hemant* v. *Bhimacharya*, ILR (1988) 12 Bom 105.
7. *C.A. Katragaddu* v. *C.R. Katragaddu*, AIR 1965 AP 177.
8. *K.R. Sankaralingam Pillai* v. *Veluchami Pillai*, AIR 1943 Mad 43 (FB).
9. *Ratneshwari Nandan* v. *Bhagwati Saran*, AIR 1950 FC 142.
10. *Pooran Chand* v. *Radha Raman*, AIR 1943 All 197; *Ratnam Chettiar* v. *S.M. Kuppuswami Chettiar*, (1976) 1 SCC 214: AIR 1976 SC 1; *Sukhrani* v. *Hari Shanker*, (1979) 2 SCC 463.
11. *Sukhrani* v. *Hari Shanker*, (1979) 2 SCC 463.
12. *Ratnam Chettiar* v. *S.M. Kuppuswami Chettiar*, (1976) 1 SCC 214: AIR 1976 SC 1.
13. *Chhatradhari Mahton* v. *Akleshwar Mahton*, AIR 1952 Pat 382.

show fraud or negligence on the part of his next friend or guardian *ad litem* the partition could be reopened.

(*f*) *Unfair advantage obtained by one over the other*: If an unfair advantage in the division of the property is obtained by one coparcener over the other or if the property allotted to a coparcener was a stranger's property, or if the property allotted was subject to a charge and the coparcener who has been allotted such property cannot be compensated otherwise, the partition may be reopened for readjustment of the shares.

(*g*) *Unequal distribution*: In cases wherein unequal distribution has been made and it is contrary to law, the property may be redistributed. And for this purpose, a partition can be reopened.

(*h*) *Mistake as to property*: If by a mistake some property which did not belong to the family is wrongly allotted to a coparcener, the partition can be reopened.

(*i*) *Heir of a disqualified coparcener or an absentee coparcener*: The heir of a disqualified coparcener or an absentee coparcener has also a right to get the partition reopened.[14]

(*j*) If property allotted to a sharer is wrongly included and subsequently it passes out of the possession of the sharer, the sharer must be compensated out of the shares of other coparceners. Consequently, if it is necessary, the partition has to be reopened for readjustment of the shares.[15]

Mere readjustment of property does not amount to reopening of a partition.

If by some mistake, accident or fraud some portion of joint property remains excluded from partition, it continues to be joint property and could be divided among the sharers later on without reopening the original partition.[16]

Other grounds: Where a co-sharer's title to the property allotted to him on partition is displaced by a superior title, he has to be reimbursed for the loss. And the burden of the loss has to be borne equally by all the co-sharers.[17] For this purpose, if necessary, the partition could be reopened. However, all the properties which were subjected to division should be available for partition. The court of equity in such cases could intervene provided the sharer seeking the court's assistance has suffered a loss.[18] A sharer who has sold away the property allotted to him is not entitled to claim either compensation or repartition, if title to the property allotted to him is subsequently displaced by a

---

14. *K.R. Sankaralingam Pillai* v. *Veluchami Pillai*, AIR 1943 Mad 43 (FB): ILR 1943 Mad 309.
15. *Debabrata Ghose* v. *Janendra Ghose*, AIR 1960 Cal 381.
16. *Balaji Ganoba* v. *Annapurna Bai*, ILR 1952 Nag 99; also see *Harihar Rajguru Mohapatra* v. *Nabakishore Rajaguru Mohapatra*, AIR 1963 Ori 45; *Hari Krishna* v. *Bhagirathi*, AIR 1975 Ori 97.
17. *Ibid.*
18. *Ibid.*

paramount title resulting in the dispossession not of himself but of his transferee.[19]

Apart from the principle of Hindu law, equity also requires that all the parties to the partition should bear equally the loss arising from certain debts found irrecoverable.[20]

Partition effected by coparceners to avoid attachment or sale so long as each of the coparceners is awarded his due share, is within their rights. Unless fraud is proved, a mere desire to save the property will not be sufficient to justify an inference of fraud.[21]

A partition, even if it has been brought to defeat the claims of creditors, is binding. [22] The burden of proof that the partition was just and fair would lie on the person supporting the partition.[23]

On the ground of fraud, coercion, misrepresentation or undue influence a partition can be reopened. [24]

20. The effect of partition

The consequences and effect of a partition would be as follows:

(1) Coparcenary is brought to an end due to partition i.e. the separated member loses the membership of the old coparcenary.[25] Consequently the separated members hold their shares as separated property.[26] Up to the time the properties are actually divided by metes and bounds the sharers hold as tenants-in-common.

(2) The other effect is that on the death of a separated member his share devolves not by survivorship but by heirship.

(3) A sharer may separate himself from other collaterals but he continues to be joint with his own male issues. Under the circumstance the property which he received while separating continues to retain in his hands its character as a coparcenary property with reference to his sons.

(4) The ancestral business loses its character as such on separation. And the consequence that follows is that it becomes subject to the provisions of the Partnership Act—and the father does not remain competent to bind his sons by debts incurred by him after partition.

---

19. *Balaji Ganoba* v. *Annapurna Bai*, ILR 1952 Nag 99; also see *Harihar Rajguru Mohapatra* v. *Nabakishore Rajaguru Mohapatra*, AIR 1963 Ori 45; *Hari Krishna* v. *Bhagirathi*, AIR 1975 Ori 97.
20. *Seshanna Chetty* v. *Sankar Narayan Chetty*, ILR 1957 AP 491.
21. *Khanna and Hari Raj* v. *Vishnu Datt*, AIR 1960 Punj 548.
22. *Lilawati* v. *Paras Ram*, AIR 1977 HP 1.
23. *Babulal* v. *Chandrika*, AIR 1977 NOC 229 (All).
24. *Ratnam Chettiar* v. *S.M. Kuppuswami Chettiar*, (1976) 1 SCC 214.
25. *Hanumamma* v. *M.T. Rama Lingaiah*, (2002) 1 HLR 305 (Kant).
26. *M.L. Subbaraya Setty v. M.L. Nagappa Setty*, (2002) 4 SCC 743.

(5) Similarly after separation the father as the manager of the joint family cannot extend limitation in regard to a pre-partition debt by means of part-payment or endorsement.

(6) A number of High Courts are of the opinion that the undivided son of the father who on his death leaves some self-acquired property, that property is inherited by such a son to the exclusion of other separated sons. However, Section 8 of the Hindu Succession Act, 1956 abolishes such a distinction.

B. REUNION

21. Reunion

(*a*) ***Meaning.***—As observed in *Babu* v. *Official Assignee*[27], reunion signifies the coming together of parties who had become once divided. In doing so their intention is of altering their divided status into a joint status with all the usual incidents of jointness in estate and interests. Thus reunion is a process whereby two or more members of a Hindu family after once separating, reunite so as to constitute a joint family.

Reunion after partition is a rare occurrence. Therefore, when it is pleaded it must be strictly proved.[28]

Under the Mitakshara school a reunion can take place only between a member and his father, brother or paternal uncle but not with any other relative.[29] One may say therefore that a reunion in estate property so called, can only take place between persons who were parties to the original partition.[30]

The reunion is formed by means of an agreement which may be express or implied from conduct.[31] This agreement is a question of fact to be proved as such. Existence of property is not essential for reunion.[32]

(*b*) ***Conditions of a valid reunion.***—There are two conditions of a valid reunion under the Mitakshara Law:

(*i*) The parties reuniting must have been parties to the original partition.

(*ii*) A member once separated can reunite only with his (*a*) father, (*b*) brother, or (*c*) paternal uncle; but not with any other relative.

Thus the text of Mitakshara law is clear as to who may reunite. The Judicial Committee has accepted this.[33]

To constitute a reunion there must also exist an intention on the part of the parties uniting to reunite in estate and in interest. The burden of proof of a

---

27. (1934) 61 IA 257: ILR 57 Mad 931: AIR 1934 PC 138.
28. *Anil Kumar Mitra* v. *Ganendra Nath Mitra*, (1997) 9 SCC 725.
29. *Ram Narain* v. *Pan Kuer*, (1935) 57 Bom LR 144 (PC) (a reunion between cousins is inoperative).
30. *Balabax* v. *Rukhmabai*, 30 IA 130.
31. *Bhagwan Dayal* v. *Reoti Devi*, AIR 1962 SC 287.
32. *Venkanna* v. *Venkatnarayan*, ILR 1947 Mad 382: AIR 1947 Mad 49.
33. *Ram Narain* v. *Pan Kuer*, (1935) 62 IA 16: AIR 1935 PC 9.

reunion lies on him who alleges reunion. At this juncture one must note that trading together or living together at the same residence does not constitute reunion unless an agreement to the effect expressing their intention exists. Reunion can take place only with consent and since a minor cannot consent,[34] he cannot make an agreement to reunite nor can anybody else do so on his behalf.

(c) *Effect of reunion*.—As observed in *Narasimha case*[35] a reunion remits the reunited members to the original status of jointness. Their shares are the same as they would be at the time of the original partition irrespective of the amount of capital contributed by each coparcener on reunion.[36] Now as observed in *Kristraya case*[37] it has been an established view both under the Mitakshara and Dayabhaga schools that after reunion *status quo ante* is fully restored: i.e. both community of interest and unity of possession get revived after reunion.

22. Exclusion from partition

See under the caption "Exclusion from inheritance and partition''.

23. Partition under *Dayabhaga* law

One must first understand the difference between partition under the Mitakshara school and the Dayabhaga school. So far we have discussed the former.

As seen before, under the Dayabhaga school the father is the absolute owner of the property and consequently the sons have no right to claim partition against him. When the father dies the sons succeed him, each one taking his defined share. Partition therefore signifies an allotment of defined, specific shares of the property among the coparceners.

One more important feature of the Dayabhaga coparcenary to be noted is that in that system coparcenary consists of males as well as females as when one of the brothers dies leaving wives or daughters behind him as his heirs. Such female coparceners can well claim a partition against the other coparceners. [38]

When a partition takes place after the father's death, his wife is entitled to a share.

24. Difference from *Mitakshara* system

There are four main points of difference between the two systems and they may be laid down as follows:

---

34. *Balabux* v. *Rukhmabai*, 30 IA 130; *Bhagirathibai* v. *Manohar*, AIR 1951 Nag 164; *Yella Venkata Subbayya* v. *Yella Venkataramayya*, ILR 1944 Mad 33.
35. *Narasimha* v. *Venkata*, ILR 33 Mad 165.
36. *Rama Swami* v. *Venkatesam*, ILR 16 Mad 440 (holds a contrary view).
37. *Kristraya* v. *Venkatramia*, (1909) 19 MLJ 723 (FB); see also *Narasimha* v. *Venkata*, ILR 33 Mad 165.
38. *Durga* v. *Chintaman*, ILR (1904) 31 Cal 214.

(*i*) as to the concept of partition.

(*ii*) as to the allotment of shares.

(*iii*) as to the expression of intention to separate; and

(*iv*) as to the persons entitled to partition.

We shall briefly put them as follows:

Mitakshara System	*Dayabhaga System*
(*a*) ***Partition.***—	
(*i*) Partition consists in ascertaining and defining the shares of coparceners because before that no definite share could be predicated by any member.	Even without partition each coparcener has a definite share in the joint property of which he is the absolute owner. Partition under this system therefore consists in separating and assigning the share in the property to each coparcener.
(*ii*) Partition means severance of joint status and there may not be actual division of property by metes and bounds.	Under this system partition means dividing the joint property by metes and bounds.
(*iii*) Thus the essence of coparcenary under this system is unity of ownership.	Under the Dayabhaga system the essence of coparcenary is unity of possession.
(*b*) ***Allotment of shares.***— The rules as to the allotment of shares under both the systems are the same except that.—	(*i*) Under the Dayabhaga system sons have no right to have any share in the joint property, if their father is living, and (*ii*) The share of a deceased coparcener passes to his heir whether he is a male or a female or to an assignee or to a devisee.
(*c*) ***Expression of intention to separate.***—	
(*i*) Agreement between coparceners to hold and enjoy the property in defined shares is a sufficient manifestation of their irrevocable intention to separate (actual divisions of	Agreement of this kind is not considered to be a sufficient manifestation of intention. There should be divisions of property by metes and bounds and nothing short of this would suffice.

	Mitakshara System	Dayabhaga System
	property by metes and bounds are not necessary).	
(*d*)	***Persons entitled to claim partition.***—	
(*i*)	A female under the Mitakshara system is not a coparcener. She therefore cannot enforce a partition.	Every adult coparcener, whether a male or a female, can enforce a partition.
(*ii*)	A son, grandson and a great-grandson can demand partition against his immediate ancestor. This is so because he acquires by birth an interest in the ancestral property.	A son is not entitled to enforce a partition against his father so long as he is living. This is because a son does not acquire an interest in the joint property by birth.
(*iii*)	A wife cannot demand a partition. When there is a partition between her husband and her sons, she is entitled to a share.	So long as the father is living such a question would not arise.
(*iv*)	There is no distinction in share as there is in the Dayabhaga system.	Under this system a sonless step-mother is not entitled to a share when there is a partition between her stepsons.

Under the Dayabhaga school a mother's right to take a share on partition between sons may be taken away by the husband by disposing of his entire property by Will. However, in such a case she has a right of maintenance out of her husband's property. As observed in *Barahi* v. *Debkamini*[39] by the Calcutta High Court, a mother's right to a share is also denied when only a portion of the property is divided between her sons on partition, leaving behind sufficient property undivided from which the mother can have her maintenance.

Suppose a suit by a son is instituted under the Dayabhaga school for partition. Here the mere institution of the suit gives her no right to have a share in her husband's property. If the suit is withdrawn she can claim no share. However, when a decree is passed in that suit, she is entitled to a share.

On partition between sons by different mothers, the property is first to be divided into as many shares as there are sons. Thereafter each mother is allotted a share equal to that of her son. A mother having only one son is not entitled to have a separate share. She has a right to have her maintenance out of the portion allotted to the son.[40]

39. 20 Cal 682.
40. *Hemangini* v. *Kedarnath*, 16 Cal 758.

So far as a grandmother is concerned she has no right to enforce a partition. However, when there is a partition between her sons and grandsons or between her sons and a predeceased son's daughter who inherited the share of her deceased father, the grandmother can claim a share. If there takes place a partition between her grandsons and great-grandsons, she gets the share of a grandson. Stridhana property received by her from her husband or from her father-in-law, would be taken into account at this time.

(*e*) ***Fractional share***.—When from the joint property a fractional share is sold to a third party the purchaser of such a share may sue for partition of that property only. He can also ask for possession of the fractional property sold to him but he cannot demand or ask for a partition of the whole property.

(*f*) ***Summary***.—One may note the points of similarity and difference between these schools on points of partition as under:

Similarities.—(*i*) Expression of irrevocable intention to separate, according to both the schools, is the true test of partition.

(*ii*) In both these schools brothers take an equal share on partition and each brother takes *per stirpes* as regards the other branch; and the members of each branch take their share *per capita* as regards each other.

(*iii*) A grandmother cannot demand a partition.

(*iv*) The purchaser of a fractional share may sue for partition according to both the schools.

Differences.—(*i*) As per the Mitakshara school, partition consists in ascertaining and defining the shares of the coparceners, while under the Dayabhaga school, partition consists in actual division of property (called partition by metes and bounds) between the members, their shares having been already defined.

(*ii*) Under the former, expression of irrevocable intention to separate results in partition, while under the latter no partition is effected until there is a separation of shares and assignment of specific properties to each coparcener.

(*iii*) Mere institution of a suit operates as a partition under the former, while under the latter partition is complete when a decree is passed.

(*iv*) Under the former the step-mother is entitled to a share even though sonless. Under the latter such a step-mother is not entitled to a share.

(*v*) Under the Mitakshara system a wife cannot demand partition; but when her husband and sons separate she is entitled to a share. Under the Dayabhaga system no such right arises, because the father is the absolute owner of the property and the sons cannot demand partition.

(*vi*) Under the former the sons, grandsons and great-grandsons can demand partition; under the latter they do not have any right to demand partition.

Chapter VI

Impartible Estates

SYNOPSIS

A. Meaning
   1. Differs from joint family property
   2. Instances
B. How such estates originated
C. Incidents of Impartible Estates
   1. Held by one person
   2. Rule of primogeniture
   3. Whether coparcenary or joint family property
   4. Income and its accumulation
   5. Right of alienation
   6. Maintenance
   7. Debts
   8. Accretions
D. Succession to Impartible Estates

Abolition and Re-grant of Erstwhile Watan or Inami lands: Rule of Primogeniture

A. MEANING

The general rule of Hindu law is that all property is divisible equally, if it belongs to a joint family, among the coparceners. In case of a separated family it is divided among the heirs of equal degree. However, one must note that there are certain estates which descend only to a single person, i.e. to a single member of the family, to the exclusion of others. Such estates are known as impartible estates. These estates at their inception owed their existence to royal grants, for reasons either political, military, religious or personal. Mulla[1] explains it in the following words succinctly:

> "Property, although partible by nature, may by custom, or by the terms of a grant by Government, be impartible in the sense that it always devolves on a single member of the family to the exclusion of the other members."

1. Differs from joint family property

Impartible estate is usually held by the eldest member of the family. It has to be noted that this estate differs from joint family property in these respects, viz. in joint family property the members of the family can claim (*i*) the right of partition; (*ii*) the right to restrain alienation by the head of the family except for necessity; (*iii*) the right of maintenance; and (*iv*) the right of survivorship. In *Mirza Rajapushpavati case*[2] the Supreme Court has explained these points.

Impartible property can also be coparcenary property, it must be noted.[3]

2. Instances

(*a*) Ancient Zamindaris which partake the nature of sovereignty;

---

1. *Principles of Hindu Law*, 10th Edn., Chap. XXVII.
2. *Pushpavathi Vijayaram* v. *Pushavati Visweswara*, AIR 1964 SC 118: (1964) 2 SCR 403; *see* also *Annasaheb Bapusaheb Patil* v. *Balwant*, (1995) 2 SCC 543 (for meaning); *Dattatraya* v. *Krishna Rao*, 1993 Supp (1) SCC 32: AIR 1991 SC 1972.
3. *Shib Prasad Singh* v. *Rani Prayag Kumari Debee*, 34 Bom LR 1567 (PC): 59 IA 331.

(*b*) Zamindaris which descend to a single member by a special family custom;

(*c*) Palayama in the Chennai Presidency (now Tamil Nadu);

(*d*) Royal grants of revenue for services such as Jaghirs and *Saranjams* in Mumbai;

(*e*) Service tenures such as Digwari tenures and tenures attached to village offices in Chennai are some peculiar instances of impartible estates.

(*f*) The property may acquire such character by custom too. However, the custom must be ancient, invariable and established by clear and unambiguous evidence. It must be proved, as declared by the Privy Council, by custom and the custom must be proved by something like what we should in this country call *immemorial* usage.[4]

An estate cannot be made impartible by an agreement between the parties having claims to it or by compromise.

B. HOW SUCH ESTATES ORIGINATED

The reasons are mostly historical. There were some estates, though they were private estates, which were not partitioned by generations by agreement and were held by one of the claimants on behalf of all for the sake of convenience.[5]

There were other estates which formerly belonged to independent or semi-independent principalities which in the course of time were turned into ordinary principalities.

The revenue collectors of Muslim rulers in the course of time became independent and due to hereditary appointments they came to be regarded as proprietors of the districts on payment of annual revenue and this was one of the major reasons for the origin of impartible estates.

Lastly some estates were granted by the Crown as impartible estates descendible by the rule of primogeniture.

This thus accounts for the origination of impartible estates. Impartibility is essentially a creature of custom.

C. INCIDENTS OF IMPARTIBLE ESTATES

The following are the incidents of impartible estates:

1. Held by one person

The estate is held by one person at a time. The selection for the same would be made according to the following rules:

---

4. *Martand Rao* v. *Malhar Rao*, 55 Cal 403 (PC).
5. *Rajah Velugoti Kumara Krishna Yachendra Varu* v. *Rajah Velugoti Sarvagna Kumara Krishna Yachendra Varu*, (1969) 3 SCC 281: AIR 1970 SC 1795.

2. Rule of primogeniture

There can be no coparcenary in such an estate.[6] Such estate is governed and regulated by the rule of primogeniture whereunder the eldest male member in the class is to hold the property alone to the exclusion of others.

Primogeniture may be—

(*i*) lineal; or

(*ii*) ordinary.

In the former the eldest in the line is preferred while in the latter the estate would go to the male agnate who is nearer to the common ancestor.

3. Whether coparcenary or joint family property

An impartible estate is held not in coparcenary, though it may be joint family property.[7] Though in the case of a Mitakshara joint family the successor to the estate will be determined by survivorship, the other characteristics of a coparcenary, such as a right to joint enjoyment and the right to call for a partition are, by their very nature, absent in an impartible estate.[8] Although other rights which a coparcener acquires in joint family property do not exist in regard to an impartible estate, the birthright of a senior member to take by survivorship still remains. This right of survivorship is a right which the senior member would acquire by birth.[9] As it thus passes by survivorship, an impartible estate, though in the sole enjoyment of the holder for the time being and though alienable by him, must be regarded as the joint property of the holder and his family.[10]

4. Income and its accumulation

The income of an impartible estate and the accumulations of such income are the absolute property of the holder of the estate.[11] They are not an accretion to the estate. The income belongs absolutely to the holder for the time being and is not the income of the undivided (joint) family. The holder does not receive it as manager for himself and the other members of the family.[12]

5. Right of alienation

The estate is alienable by an act *inter vivos* or by Will.[13] Impartibility and inalienability do not necessarily go together and such an estate is prima facie alienable unless it be established to be inalienable in the same ways in which impartibility is established. An impartible estate even though it be an ancestral

---

6. *Sartaj Kuari* v. *Deoraj Kuari*, 15 IA 51: 10 All 272.
7. *Anant* v. *Shankar*, (1944) 46 Bom LR 1 (PC).
8. *Rama Rao* v. *Raja of Pittapur*, 45 IA 148.
9. *Krishnayya* v. *Venkata*, 35 Bom LR 1076 (PC).
10. *Lingappa Rayappa Desai* v. *Kadappa Bapurao Desai*, 42 Bom LR 832, 835: 1940 Bom 721; Manek, M.D.: *Handbook of Hindu Law*, 8th Edn., pp. 345-346.
11. *Jagdamba Kumari* v. *Narain Singh*, 2 Pat 319: 50 IA 1.
12. *Harisinhji Chandrasinhji* v. *Ajit Sinhji Chatar Sinhji*, 51 BLR 770.
13. *Lingappa Rayappa* v. *Kadappa Bapurao*, ILR (1940) Bom 721.

one, its holder can squander the property or give or sell it to a stranger. He can also give it to his second son as to defeat the right of his eldest son to take it after his death.[14] In other words, unless the power of alienation is excluded by special family custom or by nature of the tenure it can be used by the holder.

6. Maintenance

Junior members have no present right in an impartible estate. Consequently they have no right of maintenance apart from proof of relationship or custom.[15] In case of persons not entitled to maintenance under the general law on the ground of relationship, a custom must be proved entitling them to such a right.

7. Debts

The successor of such an estate takes it subject only to such burdens created and debts payable out of the estate, as bind him under the personal law.

8. Accretions

The holder of an impartible estate can incorporate his other immovable properties with the estate so as to make them also impartible and descendible to a single heir. Whether property has been incorporated or not depends upon the intention of the holder. As has been observed by the Privy Council neither movable property nor the income of an ancestral impartible property can be so incorporated with the estate.[16] In *Bishnu Priya Devi case*[17] the Orissa High Court has expressed that where new estates are acquired by the holder of an impartible estate, such acquisitions, in the absence of any material to the contrary, would also be taken as impartible.

D. SUCCESSION TO IMPARTIBLE ESTATES

It is now well settled that the fact that an estate is impartible does not make it a separate property of its holder. An ancestral impartible estate may be joint family property though there is neither a right of partition nor a right to restrain alienation, so that on the death of the last holder the estate will devolve by survivorship according to the rule of primogeniture.[18]

Subject to the rule of primogeniture[19] and by custom establishing a special rule for the selection of the single heir, the ordinary rules of succession to partible property apply to the succession to impartible property.

---

14. *Ulagallrem Perumal* v. *Rani Subbulakshmi*, 41 BLR 718 (PC).
15. *CIT* v. *Dewan Krishna Kishore*, 68 IA 155; *Kumar Krishna Yachendra* v. *Rajeswara Rao*, 68 IA 181.
16. *Shib Prasad* v. *Rani Prayag Kumari Debee*, 34 Bom LR 1567 (PC): 59 IA 331.
17. *Bishnu Priya Devi* v. *Brusbandhu Mohapatra*, AIR 1976 Ori 163.
18. *Anant* v. *Shankar*, (1944) 46 Bom LR 1 (PC).
19. *Dattatraya* v. *Krishna Rao*, 1993 Supp (1) SCC 32: AIR 1991 SC 1972.

The first thing to be done is to ascertain the class of heirs who would be entitled to succeed in case the property were partible. Thereafter the special rule has to be applied. In its absence the rule of primogeniture for the selection of a single heir is to be applied.

According to this rule of primogeniture, if there are two or more sons of the owner, the eldest is entitled to succeed. The eldest son is the son who is first born whether by a senior or junior wife and not the firstborn son of a senior wife, unless there is a family custom to that effect.

If the eldest son is dead, it will go to his eldest son and it is only on failure of his line that the estate will go to his brother.

In case of *Shudras*, a legitimate son even though younger will succeed to the estate to the exclusion of an illegitimate son. However, there is no preference on the ground of nearness of blood in cases of heirs of an equal degree and an elder brother of half blood will succeed in preference to a younger brother of the whole blood.

The Hindu Succession Act (30 of 1956) does not apply to these estates (*see* Section 5 of the Act).

The essence of what has been said above is that in order to determine the succession we have first to find out the preferable line and then to determine who among the line is the preferable heir.

So far as the Mitakshara joint family is concerned the selection of a successor is to be determined by survivorship and consequently the eldest member of the family takes the estate by survivorship.[20]

So long as the family remains joint, no female can succeed while there is a qualified member to inherit. But where the widow is the widow of the last survivor, she can succeed.

If the estate-holder separates from the family, or if the estate is his self-acquired property, the female heirs will be entitled to succeed under the ordinary law of inheritance.

In case of competition between two heirs, if the property is partible, the right of the heir with a superior right must prevail. For example, where there is an adopted son and an after-born natural son, the latter's right is superior to that of the former and therefore he will succeed to the father's impartible property to the exclusion of the former.

Under the Dayabhaga law there can be no coparcenary in the sense of Mitakshara law. Consequently, the impartible estate in all cases devolves by the rules of succession as modified by the rule of primogeniture or any special custom and female heirs will be entitled to inherit the estate as under the ordinary law.

---

20. *Shib Prasad* v. *Rani Prayag Kumari Debee*, 34 Bom LR 1567 (PC): 59 IA 331.

Abolition and Re-grant of erstwhile Watan or Inami lands: Rule of primogeniture

As observed by the Supreme Court in *Chandramohan Ramchandra Patil case*[21] the erstwhile *Inam* or *Watan* lands held by the seniormost member of the family through lineal descendant on the rule of primogeniture, on abolition of *Inamdari* or *Watandari* under the provisions of the Bombay Pargana and Kulkarni Watans (Abolition) Act, 1950 (60 of 1950) and thereafter by the Bombay Inferior Village Watans Abolition Act, 1958, after re-grant of those categories of land to the *Watandar* or *Inamdar*, became partible properties between the members of the family of *Watandar* or *Inamdar*.[22]

---

21. *Chandramohan Ramchandra Patil* v. *Bapu Koyappa Patil*, (2003) 3 SCC 552.
22. Relying on *Kalgonda Babgonda Patil* v. *Balgonda Kalgonda Patil*, 1989 Supp (1) SCC 246: AIR 1989 SC 1042; *Annasaheb Bapusaheb Patil* v. *Balwant*, (1995) 2 SCC 543.

Chapter VII

The Rule of Damdupat

SYNOPSIS

A. Meaning
B. Explanation
C. Object
D. Application of the rule
E. Who can benefit from the rule
F. Where the rule does not apply: (exceptions to the rule)

A. MEANING

This rule is a branch of the Hindu law of debts. The meaning of the expression is that the amount of interest recoverable "at any one time" cannot exceed the principal amount[1]. The reason for the existence of such a rule is that the Hindu law did not recognise any period of limitation for the recovery of debts. This rule therefore puts a limitation that at no time more than double the amount could be claimed. According to the Allahabad and Calcutta High Courts, the rule is of equity and good sense.[2]

B. EXPLANATION

Section 37 of the Indian Contract Act uses the word "other law" and this rule is covered by these words.

This rule of Damdupat does not prohibit capitalization of interest in arrears by a fresh agreement made subsequently. A fresh bond can be executed for the total amount of the principal and its interest and the total amount will be the principal for the application of the rule. The rule will not apply when a suit is instituted (*vide* Section 34, CPC).

C. OBJECT

The principle and its object was explained by the Supreme Court in *Hukumchand case*[3] that the principle was evolved for two purposes: (*i*) as an inducement to the debtor to pay the total sum, i.e. principal plus interest, at one and the same time in order to save the interest becoming in excess of the principal; (*ii*) as a warning to the creditor to take steps to recover the debt within a reasonable time so that the interest would not exceed the principal amount due and thus come within the area of the rule. This would be clear by the following illustrations.

Illustrations

(1) *X*, a Hindu lends Rs 5000 to *Y*, a Hindu, @ 15% p.a. *X* refrains from paying interest until it reaches Rs 15,000. *X* sues *Y* to recover the amount. The

---

1. *Hariram Serowgee* v. *Madan Gopal Bagla*, AIR 1929 PC 77: 1929 All LJ 406: 31 Bom LR 710.
2. *Hukumchand Gulabchand Jain* v. *Fulchand Lakhmichand Jain*, AIR 1965 SC 1692; *Nandlal* v. *Dhirendra Nath*, 46 All 775; *Gajadhar* v. *Jagannath*, 40 Cal 710.
3. *Hukumchand Gulabchand Jain* v. *Fulchand Lakhmichand Jain*, AIR 1965 SC 1692.

suit is within time, it is presumed. The amount to be recovered is Rs 10,000 + Rs 15,000 = Rs 25,000. Here, according to the rule, *X* cannot be allowed to recover more than Rs 20,000 i.e. Rs 10,000 as the principal amount and Rs 10,000 as the amount of interest. The rule thus applies here.

(2) In *Illustration* (1) above, suppose *Y* has paid Rs 7000 to *X*, by way of interest and *X* sues for the recovery of Rs 18,000 (i.e. Rs 10,000 principal amount and Rs 8000 interest amount), he can do so. One may question as to why this is so. The answer is that the rule lays down that, at any one time, *X* is not entitled to recover interest exceeding Rs 10,000. This cannot mean and cannot be construed that, in any case *X* is not entitled to interest exceeding Rs 10,000. The words "at any one time" are important.

D. APPLICATION OF THE RULE

This rule applies—

(1) to unsecured loans,

(2) to secured loans, i.e. pledge of movables and a mortgage of immovable property.

—On the question whether the rule applies to mortgages executed after the Transfer of Property Act, 1882 came into force, the opinion of High Courts vary.

The rule does not affect the Limitation Act, 1963.

(3) The rule does not prohibit capitalisation of interest, i.e. conversion of interest into arrears of capital, of course, subject to agreement.

The rule applies in the States of Maharashtra and Gujarat, in the city of Calcutta (but not elsewhere in West Bengal)-and the Santhal Paraganas. In the States of Rajasthan, Uttar Pradesh and Tamil Nadu, the rule has not been given effect to. In the rest of the States it is not applied. However, in some States it has been adopted by local Acts to cover certain cases, for example, the U.P. Encumbered Estates Act, 1934.

E. WHO CAN BENEFIT FROM THE RULE

The rule applies only if both the original parties who entered into the contract were Hindus,[4] that is if both the creditor and the debtor are Hindus. This is the view of the Calcutta High Court but the opinion of the Mumbai High Court[5] is that if only the original debtor is a Hindu the rule applies.

In *Sheokaram Singh* v. *Daulatram*,[6] Rajasthan High Court has held that the rule is discriminatory not only against the non-Hindus but also against the Hindus of those places of the same state where it does not operate. Being

4. *Nobin Chunder* v. *Ramesh Chunder*, 14 Cal 781.
5. *Harilal* v. *Nagar*, 21 Bom 38; also see *Ali Saheb* v. *Sahabji*, 21 Bom 85.
6. AIR 1955 Raj 201: 1956 Raj LW 81 (FB).

against the fundamental right of equality[7] it was declared unlawful in the state of Rajasthan.

The rule does not apply if the original debtor is a Mahommedan, though the debt is subsequently transferred to a Hindu.

Suppose there are two debtors; and one of them is a Hindu. In that case the rule will apply to the Hindu debtor and the non-Hindu debtor can claim contribution from the Hindu debtor if he has made a direct payment to the creditor.

In a debt where the original debtor is a Hindu and the debt is transferred to a Mahommedan, the rule is applicable so long as the original debtor remains, and the rule will cease to apply from the date of transfer of the debt to a Mahommedan.

F. WHERE THE RULE DOES NOT APPLY: (EXCEPTIONS TO THE RULE)

The rule does not apply—

(*i*) where the original debtor is not a Hindu. If a debt is subsequently transferred to a Hindu even then the rule does not apply;

(*ii*) where money is due otherwise than under a contract. For example where money is due from an executor to a legatee;

(*iii*) where a suit for recovery is instituted (*vide* Section 34, CPC). It is applicable up to the date of the suit. When a court awards interest from the date of the suit till the date of the decree, the same remains unaffected by the rule;

(*iv*) where interest is recoverable in execution of a decree. The rule ceases to operate after the institution of the suit;

(*v*) where the mortgage with possession is executed. However, this is subject to agreement of the parties.

In *Ramgonda Patil* v. *Shripal Balwant Rainade*,[8] the Supreme Court of India has held that there are two aspects in a mortgage: (*i*) loan and (*ii*) transfer of interest in immovable property. And as mortgage is mainly, a loan transaction. There is no reason why this equitable rule should not apply to mortgage.

If a judgment-debtor does not redeem the mortgaged property and lets the interest accumulate beyond the limit of the principle sum, he will not get the benefit of this rule,[9] because a debtor may not unnecessarily delay the repayment of debt to the disadvantage of his creditor.

---

7. Arts. 14 and 15, Constitution of India.
8. (1988) 3 SCC 298.
9. *Devidas Khushalrao* v. *Yeotmal Central Bank Ltd.*, AIR 1956 Nag 239: ILR 1956 Nag 535: 1956 Nag LJ 444.

Chapter VIII

Benami Transactions

SYNOPSIS

A. Meaning
B. Definition
C. Causes of Origin
D. Characteristics
E. (1) Position up to 18-5-1988
  (*a*) Title of the true owner: When recognised
  (*b*) Onus of proof
  (*c*) When the real title is not given effect to
  (*d*) Benamidar's right to sue
  (*e*) Decree against benamidar
(2) Position from 19-5-1988
  (*a*) Benami Transactions (Prohibition) Act, 1988
  (*b*) Its effect

A. MEANING

"*Benami*" is a Persian word which consists of two words: "*be*" is a prefix which means without and "nami" means a name. *Benami* means "without a name".

When a person enters into a transaction without using his own name but using another's name, so as to give an appearance to that transaction that it is entered into by a person other than himself, the transaction is called a *benami* transaction.[1] For example *A* buys property in the name of *B*. This transaction is a benami one, because *B* has not paid the purchase money but *A* has paid it. Such a practice is common in India among Hindus and Mahommedans both. Under Mahommedan law such transactions have been termed as "*furzee*".[2]

The benamidar must be, however a legal person. A benami transaction therefore cannot be in the name of an animal or tree or machine and the like.

B. DEFINITION

Mulla[3] defines such transaction as under:

> "Where a person *buys* property with his own money, but in the name of another person or buys property in his own name, but subsequently *transfers* it into the name of another person, *without any intention in either case to benefit such other person*, the transaction is called "benami" and the person in whose name the property is purchased or the transaction is effected is called "benamidar".[4]

---

1. *Suru Laxmiah Chetty* v. *Kothandarama Pillai*, AIR 1925 PC 181: 52 IA 286: 88 IC 327. (It may be in the name of wife, child, idol or concubine or any other).
2. In Muslim law it is called Ism Farzea i.e. *Ism* means name and *farzee* means fictitious.
3. D.F. Mulla: *Principles of Hindu Law*, 10th Edn., para 604; see *Pitchayya* v. *Ratamma*, AIR 1929 Mad 268, 269.
4. See *Rangappa* v. *Ranga Swami*, AIR 1925 Mad 1005.

A Benami transaction is different from a sham transaction. *Rangappa case*[5] explains this.

According to John D. Mayne the Benami law is "in no sense a branch of Hindu law."[6]

C. CAUSES OF ORIGIN[7]

One may well pose a searching question as to why a *Benami* transaction is entered into and how this practice arose even though it is risky to do so. To this question the following are the possible answers which depict that to avoid a greater risk, this practice was resorted to:

(*i*) to avoid certain political and social risks;

(*ii*) to avoid appreciable risk from one generation to another;

(*iii*) to avoid loss of property on hostile conquest or confiscation of property;

(*iv*) besides this, love of secrecy is also a possible reason;

(*v*) to avoid claims of other members of one's own family;

(*vi*) to escape restrictions imposed upon persons by Government Servants' Conduct Rules;

(*vii*) a desire to evade taxes;

(*viii*) to defeat the claims of creditors; and

(*ix*) to avoid property being sold or seized in execution of a court decree.

D. CHARACTERISTICS

Use of an *alias* in respect of holding of property and concealment of the real owner's name are the two main characteristics of a benami transaction.

Where a person acquires an interest in property with his funds in the name of another for his benefit, the latter is called a Benamidar.[8] A Benamidar is not a trustee in the strict sense of the term. He has the ostensible title to the property standing in his name, but the property does not vest in him. It is vested in the real owner. He is only a *name-lender* or an *alias* for the real owner. The real owner has got the legal title though the property is in the name of the benamidar.

A Benami purchase or conveyance leads to a resulting trust in India, just as a purchase or transfer under similar circumstances leads to a resulting trust in England.

Business also may be carried on in the name of a person other than a real owner and it is therefore covered by the benami system.[9]

---

5. *Rangappa* v. *Ranga Swami*, AIR 1925 Mad 1005.
6. J.D. Mayne: *Hindu law and Usage*, (1953) p. 953.
7. B.M. Gandhi: *Equity, Trusts & Specific Relief*, 2nd Edn., pp. 92-100.
8. *Pitchayya* v. *Ratamma*, AIR 1929 Mad 268, 269.
9. J.D. Mayne: *Hindu law and Usage*, (1953) p. 953.

E. 1. POSITION UP TO 18-5-1988

(*a*) ***Title of the true owner: When recognised.***—When it is proved that a transaction is of a benami character, the law will give effect to true owner's title because in such a case a resulting trust arises. The Indian Trusts Act also provides to this effect.[10]

After May 19, 1988 there is a general prohibition against such dealings, but before this date the court helped the true owner. A similar situation in England gave rise to the doctrine of advancement. However, this doctrine does not apply in India, except to Europeans and Parsis because of the difference of social conditions and family life. In *Shambhu Nath case*[11] a Hindu person deposited his own money in a bank in the joint names of himself and his wife on terms that the amount was to be paid to either of them or the survivor. After he died, it was held that this did not constitute a gift by him to his wife. In the absence of proof of a contrary intention, a resulting trust would arise[12] and the money would form a part of his estate. This is so because there is no presumption of advancement applicable in India in favour of a Hindu wife. Similarly the benami purchases by a father in the names of his children, which are frequent in India, would not constitute advancement by the father for the benefit of his children. Thus the view taken in *Shambhu Nath case*[13] is reflected in *Gopee Kristo case*[14].

So long as the real title is not established by exposing the benami character of the transaction, the benamidar represents the real owner with regard to the outside world and any decree properly obtained against him in suits arising from his dealings with the property will bind the real owner.

(*b*) ***Onus of proof.***—The burden of proving that a transaction is benami lies on the person who asserts that it is such a transaction[15] and it must be strictly so made out. The decision of the court cannot rest on mere suspicion but must rest on legal grounds and legal testimony. In the absence of evidence the apparent title must prevail. The real test is the source whence the consideration came. When it is not possible to obtain evidence which conclusively establishes or rebuts the allegation of it being of a benami nature, the case must be dealt with on reasonable probabilities and legal inferences from proved or admitted facts.[16]

The following points must be considered in order to decide whether a particular transaction is of a benami nature:

(*a*) Source from where the money came.[17] This is called the objective test.

---

10. See Ss. 81 and 82 of the Indian Trusts Act, 1882.
11. *Pandit Shambhu Nath Shivpuri* v. *Pandit Pushkar Nath*, (1943-44) 71 IA 197.
12. *Thakur Bhim Singh* v. *Thakur Kan Singh*, (1980) 3 SCC 72, 81-84: AIR 1980 SC 727.
13. *Pandit Shambhu Nath Shivpuri* v. *Pandit Pushkar Nath*, (1943-44) 71 IA 197.
14. *Gopee Kristo* v. *Gangaprasad*, (1854-57) 6 MIA 53: 2 Suther 13: 4 WR PC 46; *Thakur Bhim Singh* v. *Thakur Kan Singh*, (1980) 3 SCC 72, 81-84.
15. *Sitaram* v. *Ramrao*, 1931 Nag 91: 130 IC 817.
16. *Gangadara Ayyar* v. *Subramania Sastrigal*, AIR 1949 FC 88.
17. *Jagal Kishor* v. *Narayan Chandra*, AIR 1982 Cal 342.

(*b*) The nature and character of possession and the person who is in possession.

(*c*) Relationship between the parties where a mother transferred property with the proved intention to exclude the son from inheriting, it was held that the transaction was gift and not benami.[18]

(*d*) Circumstances, pecuniary or otherwise, of the transferor and his motive in making the transfer.

(*e*) Party who is in possession of the title deeds of the property.

(*f*) Conduct of the parties after and before the transfer.

No single factor can decide the case. All the factors taken together would enable the court to arrive at a decision as to whether the ownership of the property is really transferred and in whom or where the real title to the property lies.

(*c*) ***When the real title is not given effect to.***—The following are cases wherein the court will refuse to give effect to the real title and "will allow the estate to lie where it falls". These are therefore the *exceptions* to the rule.

(*a*) Where the benamidar is a *certified purchaser* under a court sale (Section 66).[19]

(*b*) Where the property has been transferred by the benamidar to a bona fide purchaser for value without notice of the benami character of the property.[20]

(*c*) Where the benami transaction was effected with a view to defraud the creditors of the real owner and the fraud is effected.[21]

(*d*) Where, but for the benami character, the transaction would be illegal. For example, where government servants, who are not by law allowed to buy certain properties, buy it in the names of others.[22]

(*d*) ***Benamidar's right to sue.***—Against all third parties the benamidar represents the true owner. He can, therefore, sue third parties, whether the suits arise out of contract or out of a title dispute regarding immovable property.[23]

(*e*) ***Decree against benamidar.***—When a suit is filed by the benamidar it is presumed that he sues with the full authority of the real owner. In consequence therefore, the decision in the said suit binds the real owner as if he himself had filed the suit.[24]

---

18. *Ismail Moosaji Mooker* v. *Aafiz Boo*, (1906) 3 IA 86: (1906) 33 Cal 773: 8 Bom LR 379.
19. *See* S. 66, CPC.
20. *See* S. 42, Transfer of Property Act.
21. *Chenvirappa* v. *Putappa*, 11 Bom 708; *Gopi* v. *Markande*, 3 Bom 30.
22. *Sheo Narayan* v. *Mata Prasad*, 27 All 73.
23. *Gur Narayan* v. *Sheolal Singh*, (1919) 46 IA 1: AIR 1918 PC 140: 49 IC 1; *Narendra Nath Roy* v. *Midnapore Zamindari Co. Ltd.*, AIR 1940 Cal 115: 70 Cal LJ 218: 44 Cal WN 38.
24. *Shangara* v. *Krishnan*, (1892) 15 Mad 267.

2. POSITION FROM 19-5-1988

(*a*) ***Benami Transactions (Prohibition) Act, 1988.***—Experience has shown that such transactions become fraudulent and create legal and factual controversies,[25] increasing complexities and uncertainty in law. Moreover the State is a loser of tax. Consequently the Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988 was passed on May 19, 1988 to come into force at once. The Benami Transactions (Prohibition) Act, 1988 has replaced the ordinance. The Act applies to Benami transactions and not to sham transactions.[26]

(*b*) ***Its effect.***—This Act repeals the following provisions:

(*a*) Sections 81, 82 and 94 of the Indian Trusts Act, 1882;

(*b*) Section 66 of the Civil Procedure Code, 1908; and

(*c*) Section 281-A of the Income Tax Act, 1961.

Section 2 of the Act defines a benami transaction as any transaction in which property is transferred to one person for a consideration paid or provided by another person.

Section 3 prohibits all types of benami transactions except purchases of property made in the name of one's wife or unmarried daughter. Section 3(2) raises a presumption that unless the contrary is proved the property so purchased shall be presumed to have been purchased for the benefit of the wife or the unmarried daughter. Thus the presumption of "advancement" now rebuts the presumption of a "resulting trust" in favour of the purchaser. It is now an offence [Section 3(3)] to enter into a benami transaction and the offence is punishable with imprisonment up to 3 years or fine or both. The offence is non-cognizable and bailable.

Benami properties are liable to acquisition by the Government without payment of any amount (Section 5).

Section 4 of the Act prohibits the filing of a suit by the real owner against the benamidar on the ground that the latter was holding the property benami. Similarly, a defence cannot be raised in a suit that the defendant was holding the property benami. A mere allegation that the property is held benami by the plaintiff will not attract Section 4 of the Act.[27] A suit for specific performance by a purchaser of land does not lie on the ground that the land was held benami.[28]

In its sweep Section 4 envisages past benami transactions also within its retroactivity. In this sense it is both a penal and a disqualifying statute.

---

25. *Hasman Gani Ahmed Saheb* v. *Vidyadhar Krishna Rao Mung*, Appeal No. 533 of 1968 decided on January 17, 1969.
26. *Ouseph Chacko* v. *Raman Nair*, (1989) 180 ITR 511 (Ker).
27. *Kesho Ram* v. *Chetan Das*, (1991-1) XCIX Punj LR 511.
28. *P. Ramachandra Rao* v. *G. Jangaiah*, (1989) 179 ITR 438 (AP).

Chapter IX

Gifts and Wills

SYNOPSIS

A. Gifts
1. Definition
2. Subject-matter of gift
3. When is a gift complete
4. Capacity to make a gift
5. Capacity of the donee to acquire
6. Gift to unborn persons
7. Deposit in the name of wife or child
8. Gifts with conditions restraining alienation
9. Gift in fraud of creditors
10. Donation *mortis causa*
11. Gifts reserving usufruct of property gifted
12. Trusts
13. Revocation of gift
14. Proof
15. Distinction between gifts and Wills

B. Wills
1. Definition
2. Testamentary power to make a Will
3. Capacity to make a Will
4. Capacity to take under a Will
5. What may be bequeathed
6. Probate and letters of administration
7. Bequest to unborn persons
8. Will in favour of a female
9. Estates unknown to Hindu law
10. Power of appointment
11. Direction for accumulation
12. Construction of Wills

A. GIFTS

1. Definition

A "gift consists in the relinquishment (without consideration) of one's own right (in property) and the creation of the right of another.[1] This creation of another's right is completed on that other's acceptance of the gift, but not otherwise".[2]

Hindu law envisages a gift in three ways:

(*i*) by mental acceptance,

(*ii*) by verbal acceptance,[3] and

(*iii*) by corporeal acceptance.

In every case delivery of possession was essential to validate a gift and more so in case of a gift of land because the produce of the land cannot be enjoyed without possession, however little it may be. If it is not so, the gift would be incomplete. Pure Hindu law did not require a written document in the case of a gift, but delivery of property was necessary. The Transfer of Property Act, 1882, which applies to Hindus from 1st April, 1930 has the effect of abrogating the rule of pure Hindu law that delivery of possession is necessary for the validity of a gift. This will be clear if we look to the definition of gift. A

---

1. *Deo Saran* v. *Deoki*, AIR 1924 Pat 657: ILR (1924) 3 Pat 842: 5 Pat LT 305.
2. *Mitakshara*, Chap. 3, Ss. 5 & 6.
3. *Tirath* v. *Manmohan Singh*, AIR 1981 P&H 174.

gift, as defined by the Transfer of Property Act[4], is a transfer of certain existing property made voluntarily and without consideration by one person called the donor, to another called the donee, and accepted by or on behalf of the donee. Presently a gift of immovable property can be made only by a registered document, signed by or on behalf of the donor, and attested by at least two witnesses. A gift of movable property may be made either by a registered instrument or by delivery of possession of the subject of gift.

2. Subject-matter of gift

According to all the schools of Hindu law a Hindu may dispose of the following properties by a gift:

(*i*) Separate or self-acquired property of a Hindu whether governed by *Mitakshara* or *Dayabhaga*;

(*ii*) All property whether separate or joint under the *Dayabhaga* law;

(*iii*) All ancestral property in the hands of a sole surviving coparcener;

(*iv*) Impartible property, unless there is special custom prohibiting its alienation or terms of the tenure prohibiting its alienation;

(*v*) *Stridhana* property of a female which is a woman's absolute property;

(*vi*) Small portions of property inherited by a widow;

(*vii*) Movable property inherited or obtained by way of a share on partition by a widow under the *Mayukha*; and

(*viii*) Small portions of coparcenary property in the hands of a father.

With reference to number (*vi*) above the reason is that under Section 14 of the Hindu Succession Act, 1956, any property possessed by a female Hindu, whether acquired before or after the commencement of the Act shall be held by her as the full owner thereof and not as a limited owner.

As regards number (*i*) above, the gift is subject to claims for maintenance of those members of the family whom the donor is bound to maintain.[5]

3. When is a gift complete

As seen before, according to pure Hindu law delivery of possession was not an essential ingredient to the making of a gift of immovable property but the Transfer of Property Act has modified this proposition and a gift of immovable property can only be effected by a registered document signed by or on behalf of the donor and attested by at least two witnesses.

Regarding movable property it can be made by delivery of the property or by a registered instrument signed as aforesaid.[6]

---

4. S. 122.
5. *See* Ss. 18 to 22 of the Hindu Adoptions and Maintenance Act, 1956.
6. *Kalyan Sundaram* v. *Karuppa*, 59 IA 89: 50 Mad 193 (PC): AIR 1925 PC 42.

In certain areas of Punjab, however, where the Transfer of Property Act does not apply, a gift may be in writing or even an oral gift. Delivery of possession in such cases is necessary. If delivery of possession is not possible, then the donor must do everything in his power to complete and validate the gift so that the donee may obtain its possession.[7] This position can be made clear by a concrete example. Say, the property gifted is in adverse possession of a third party; in such a case the donor can make a gift deed in the donee's favour. Similarly if property to be gifted is in a tenant's possession[8], the gift can be completed by the tenant attorning to the donee at the donor's request, i.e. by the tenant regarding the donee as his landlord, in place of the donor, the original landlord and paying the future rents to the donee. It may also happen that the property to be given in gift is in possession of the donee.[9] In such cases the donor can declare that he has gifted the property in question and the donee can accept the gift. This Will make the gift complete.

In cases where the Transfer of Property Act applies, delivery of possession is not necessary to complete the gift as said before.[10] The gift, however, must be accepted by the donee.

A gift of money cannot be completed by the donor by passing an entry in his books of accounts on a particular day.[11]

4. Capacity to make a gift

Every Hindu male or female, who is not a minor and is of sound mind, can dispose of his property by gift or Will. The donor must be a major within the meaning of Section 3 of the Majority Act; if he is not, he cannot make a gift.

A coparcener of a Hindu joint family cannot make a gift of his undivided interest in joint family property without the consent of all the other coparceners. However, he can make a Will of such property.[12]

Though a father in a Mitakshara joint family has complete power of disposition over his self-acquisitions and to make gifts, he has no such plenary power in respect of joint family property. Of course, he is competent to make a gift of movable property, out of affection (e.g. to his wife). But this should be within reasonable limits[13] and a gift of the whole or almost the whole of the ancestral property cannot be upheld.[14] A father's power in regard to a gift of immovable ancestral property is much more curbed. If he makes a gift of such immovable property to his wife and thus carries out the wishes of his father, the same is not valid. Gifts of ancestral immovable property must be within

---

7. *Kali Das Mullick* v. *Kanhya Lal Pandit* (*and on his decease Behari Lal Pandit*), 11 Cal 121: (1883-84) 11 IA 218.
8. *Bank of Hindustan* v. *Premchand*, (1868) 5 BHC 83 OC.
9. *Bai Kaushal* v. *Lakhma*, 7 Bom 452.
10. *See* S. 122, Transfer of Property Act, 1882.
11. *Nathmal* v. *Controller of Estate*, ILR (1969) 19 Raj 301.
12. S. 30, Hindu Succession Act, 1956.
13. *Ammathayee* v. *Kumarsen*, AIR 1967 SC 569.
14. *Ibid.*

reasonable limits and for pious purposes.[15] Under the *Dayabhaga* law, a father being the absolute owner of all the property, whether self-acquired or ancestral, can freely dispose it of.

5. Capacity of the donee to acquire

A donee must be a person in actual existence or in contemplation of law when the gift or bounty is to take effect.[16] The donee may be a minor or an idiot or one incapable of inheriting due to some personal disability. A gift given to a person possessing certain character (e.g. an auras son) cannot be acquired by a person who does not possess that character. However, the rule laid down in *Tagore case*[17] is now altered by the Acts stated below.[18]

6. Gift to unborn persons

Traditional Hindu law did not recognise such gift or Will in favour of unborn persons for the simple reason that the donee or legatee must be in existence at the material date. To remove this incapacity the following Acts were passed: (*i*) the Hindu Transfers and Bequests Act, 1914; (*ii*) the Hindu Disposition of Property Act, 1916; and (*iii*) the Hindu Transfers and Bequests (State of Chennai) Act, 1921.

These Acts have modified the provisions of traditional Hindu law. They provide that no gift would be invalid because the persons for whose benefit the gift was made were not born at the date of the gift or at the date of the death of the testator. The rule against perpetuities,[19] and the rule regarding transfer for the benefit of unborn persons[20] and Chapter 2 of the Transfer of Property Act, are now applied[21] to gifts and bequests in the case of Hindus. These provisions are summarised briefly as under:[22]

(*a*) Where a gift is made to an unborn person it should be preceded by a prior disposition in favour of a living person and the gift made to the unborn person must comprise the *whole of the remaining interest* (residue) so gifted.

(*b*) The gift made must not offend the rule of perpetuity (Section 14, Transfer of Property Act and Section 114, Indian Succession Act).

(*c*) A gift given to a class of persons, if it is void with regard to some of them, will fail with regard to these persons only. It will not fail with regard to all the persons.

---

15. *Ammathayee* v. *Kumarsen*, AIR 1967 SC 569.
16. *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore*, (1872) 9 Beng LR 377: IA Supp Vol., p. 47.
17. *Ibid.*
18. See *Raman Nadar* v. *Snehappoo*, (1969) 3 SCC 42: AIR 1970 SC 1759.
19. S. 14, Transfer of Property Act, 1882 and S. 114 of the Indian Succession Act, 1925.
20. S. 13, Transfer of Property Act, 1882 and S. 113, Indian Succession Act, 1925.
21. From April 1, 1930.
22. *See* Ss. 13, 14 & 15, Transfer of Property Act, 1882.

(*d*) If a gift made to an unborn person is void as it offends Section 13 or Section 14 of the Transfer of Property Act, any gift which is intended to take effect after such gift, Will also be void.

7. Deposit in the name of wife or child

In such cases the mere fact that the deposit is taken in joint names does not lead to a conclusion that it was a gift made to the other person.[23] Evidence to show the intention of the depositor must be led. Money deposited by a father in the name of his son alone does not constitute a gift, unless an intention to that effect is proved. There is no presumption of advancement.

8. Gift with conditions restraining alienation

A gift made by the donor, with a condition absolutely restraining the donee from alienating the property is not bad in law but the condition will be void. Similarly a condition that the two donees will not partition the property is void, and the gift will remain valid and unconditional.[24]

9. Gift in fraud of creditors

Such a gift is voidable at the option of the creditors.[25]

10. Donation mortis causa (gift made in contemplation of death)

Such a gift is recognised by Hindu law and is valid.[26]

11. Gift reserving usufruct of property gifted

A gift of property wherein the donor reserves for himself the usufruct of the property for the duration of his life is not invalid. *Lallu Singh case*[27] explains this. In this case *X* by a registered deed of gift made for seven villages in favour of his daughter *Y* delivered possession of four of them. A condition was there in the deed that *Y* would retain possession and enjoy the profits thereof during her lifetime and she would not have any right to transfer these villages to anyone. The questions that arose were: Is the entire gift valid? Or is the gift valid in regard to four villages only? The court held that the entire gift (of seven villages) was valid. Reservation of the right to enjoy the usufruct of the three villages during the lifetime of *Y* by *X* does not invalidate the gift as to the three villages.

12. Trusts

Before passing of the Indian Trusts Act, 1882, a Hindu person could make a trust by making a delivery of his property to the trustees as in case of a gift. As observed in *Kahandas Narandas case*[28], trusts are similar to gifts, both as

---

23. *Nagarajamma* v. *The State Bank of India, Cuddapah*, (1961) 1 Andh WR 65.
24. *Narayanan* v. *Kannan*, 7 Mad 315.
25. *See* S. 53, Transfer of Property Act, 1882; *Nasir* v. *Mota*, 2 All 891.
26. *See* S. 191, Indian Succession Act, 1925; *Bhaskar* v. *Saraswatibai*, 17 Bom 846.
27. *Lallu Singh* v. *Gur Narain*, AIR 1922 All 467: (1923) 45 All 115.
28. *Kahandas Narandas, In re*, (1881) 5 Bom 115, 173, 174.

regards the property to be transferred and as to the persons to whom it can be transferred. After the Act of 1882, a trust which is not created for public, religious or charitable purposes, is governed by the Indian Trusts Act, 1882.[29]

The Act provides that (*i*) a trust in case of immovable property would be valid only if it is declared by a registered non-testamentary instrument in writing signed by its author, or the trustee and registered, by the will of the author of the trust or of the trustee.

(*ii*) As regards movable property the trust must be declared as aforesaid or the ownership of the property must be transferred to the trustee.

(*iii*) As regards the type of property that can be settled and the person in whose favour a trust is to be made, the position as it obtains in case of gifts obtains here too. The above rules would not apply where they would result in effectuating a fraud.

13. Revocation of gift

Ordinarily a gift made validly and complete in all respects, binds the owner. He cannot revoke it[30] unless it was obtained by the donee by fraud or undue influence.[31] A gift, however, can be revoked before its acceptance by the donee.[32] Similarly a gift made in order to defeat or defraud creditors is voidable at the option of the creditors.[33]

In *R. Kuppayee case*[34] the respondent father made a gift of property to his daughter. The respondent thereafter stated that he had been defrauded. On facts it was held that the finding of the trial court upheld by the first appellate court and the High Court are based on misreading of the evidence, hence it was set aside. The question of limits of gift came up for consideration before the court, i.e. whether a father can make a gift of an ancestral immovable property within reasonable limits in favour of his daughter at the time of her marriage or even long thereafter. The court observed that reasonable limit depends upon factors such as status of the family, extent and value of the property owned by the family and extent and value of the property gifted. When the father who gifts, says that the gift was not valid (daughters being appellants), he must plead and prove that the gift was excessive and unreasonable.

The Court also held that the meaning of the words "pious purpose" cannot be extended so as to include other female members.

14. Proof

Where a gift is made by a Hindu widow, the donee or the proponent has to prove that the gift was made by her while she was in a sound and disposing state

---

29. S. 5, Indian Trusts Act, 1882.
30. *Manigauri* v. *Narandas*, (1891) 15 Bom 539.
31. *Ganga Baksh* v. *Jagat*, (1896) 22 IA 153: ILR 23 Cal 15.
32. *Kalyan Sundaram* v. *Karuppai*, AIR 1927 PC 42: (1927) 54 IA 89: ILR 50 Mad 193.
33. *Bishen Chand* v. *Asmaida Koer*, (1884) 11 IA 164: ILR 6 All 560.
34. *R. Kuppayee* v. *Raja Gounder*, (2004) 1 SCC 295: AIR 2004 SC 1284: (2004) 2 CHN 117: (2004) 265 ITR 551.

of mind with full understanding as to what she was doing and that the document of gift was explained to her.[35] In short the donor may be led but not driven.

15. Distinction between gifts and Wills

Gift has been defined by Section 122 of the Transfer of Property Act, 1882. Accordingly it is a transfer of certain existing property made voluntarily and without consideration by the donor to the donee who accepts it. A Will, on the other hand, is, as defined by Section 2(*h*) of the Indian Succession Act, 1925, a legal declaration of the intention of its maker with regard to his property, which he desires to carry into effect after his death.

A gift takes effect immediately but a Will comes into operation after its author's death.[36] A gift conveys a present interest in existing property, a Will conveys a deferred interest in existing property and may be in relation to future property. A completed gift is ordinarily irrevocable, while a Will may be revoked by its author at any time before his death.

B. WILLS

1. Definition

Section 2(*h*) of the Indian Succession Act, 1925, defines a Will as "the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death".

A Will is not an instrument of transfer of property by sale, gift, exchange or mortgage or lease or assignment, nor it is an agreement. These transactions need two living persons whereas a Will is a unilateral declaration of a person fixing his own line of succession to his estate on his demise. The Will speaks on the death of the testator. It is an instrument that contains the last desire of the testator.[37] It may change the course of devolution of property as prescribed by law about intestate succession.[38]

There are three requisites of a Will:

(1) Legal declaration,

(2) Disposal of property, and

(3) Posthumous effect.[39]

2. Testamentary power to make a Will

Wills were wholly unknown to pure Hindu law. But as observed in *Beer Pertab case*[40] by the Privy Council "it is too late to contend that, because the

---

35. *Deo Kuar* v. *Man Kuar*, (1894) 17 All 1.
36. *Mahalinga Thambiran Swamigal* v. *Arulnandi Thambiran Swamigal*, (1974) 1 SCC 150: AIR 1974 SC 199.
37. *Pradip Saikia* v. *Suwala Saikia*, (2006) 2 HLR 73 (Gau).
38. *Gasfulobhai Mohamadbhai Bilodkhia* v. *State of Gujarat*, (2005) 2 HLR 76 (Guj).
39. *Pentakota Satyanarayana* v. *Pentakota Seetharatnam*, (2005) 8 SCC 67.
40. *Beer Pertab* v. *Rajendra Pertab*, (1876) 12 MIA 1.

ancient treatises made no mention of a Will, a Hindu cannot make a testamentary disposition of his property. Decided cases, too numerous now to be questioned, have determined that the testamentary power exists, and may be exercised at least within the limits which the law prescribes to alienation by gift *inter vivos*". "Even if Wills are not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer and the persons to whom it can be transferred."[41]

This testamentary power to make Wills was first recognised and admitted in Bengal, then in South India and thereafter in the former State of Mumbai. The Indian Succession Act, 1925, makes provisions in this regard.

3. Capacity to make a Will

Every Hindu, having a sound mind and not a minor, can make a Will. In this regard minority would be determined by the Indian Majority Act, not by the rules of Hindu law.

As observed by the Supreme Court a coparcener even if he is a father cannot by a Will devise the joint family property or any part thereof. This is so because on his death the joint family property passes by survivorship to another coparcener and when the Will takes effect there remains nothing upon which the Will would operate.[42] A bequest to be effective can be made in favour of an existing person or persons in succession on the date of death of the testator.[43]

4. Capacity to take under a Will

As to acceptance of bequests under a Will, there are no restrictions. Even a minor or an idiot or a lunatic can take under a Will. One must remember that disabilities excluding a person from inheritance and from a share on partition are of no avail here and would not disqualify a person from taking a bequest.

5. What may be bequeathed

A testator can bequeath by Will all the properties of which he can make a gift (*see* above). Thus all properties which a person can dispose of by a transfer *inter vivos* may be disposed of by him by a Will.

Prior to 1956, a Hindu could not dispose of property by Will which he could not have alienated by a gift *inter vivos*. But now he can. To this proposition there is one exception that he cannot so dispose of his property by Will as to defeat his wife's or any other person's legal right of maintenance.[44]

---

41. *Tagore* v. *Tagore*, 9 Beng LR 377.
42. *M.N. Aryamurthy* v. *M.D. Subbaraya Setty*, (1972) 4 SCC 1: AIR 1972 SC 1279.
43. *Basti Ram* v. *Ved Prakash*, AIR 1974 P&H 152.
44. *See* Ss. 18 to 22, Hindu Adoptions and Maintenance Act, 1956.

The Privy Council in *Soorajeemoney Dossey case*[45] and in *Beer Pratab case*[46] recognised the testamentary power of Hindus over their property and reiterated that though the idea of Will was wholly unknown to the pure Hindu law, yet the modern Hindu jurist hold that a Hindu has the competence to make a Will.[47]

Now under Section 30 of the Hindu Succession Act, 1956: "Any Hindu may dispose of by Will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925 or any other law for the time being in force and applicable to Hindus." Explanation to Section 30 makes this position very clear and removes old restrictions. However the following propositions must be taken care of.

Though the undivided coparcenary interest of a Hindu governed by the *Mitakshara* law is not capable of being disposed of by him by means of a sale, gift or otherwise *inter vivos*, it can now be disposed of by him by a Will.

One cannot by making a Will of his entire property defeat the claims of one's wife and of other persons legally entitled to maintenance from him.[48]

All the schools of Hindu law agree that one's self-acquired property could be disposed of by Will, but regarding coparcenary property the *Dayabhaga* School recognises the right of a coparcener to dispose of his undivided interest in the joint family property by Will, while the *Mitakshara* School prohibits this and even if other coparceners consent, this could not be done. Inspite of this position before 1956, Section 30 of the Hindu Succession Act, 1956 has removed this bar and now such an interest can be disposed of by a Will.

Insofar as an impartible estate concerned its owner can, unless the nature of the estate did not admit such alienation, or unless some custom prohibits it, dispose of such estate by a Will. Tenancy right is not a property or estate of a tenant. He cannot therefore make a testamentary disposition of that right.[49]

A Hindu female can dispose of by Will her *stridhana* which is *Sandayika*. In disposal of non-*Sandayika Stridhana* her husband's consent was required to validate the Will. But now, Section 14 of the Hindu Succession Act, 1956 removes this bar and makes the woman an absolute owner of such property, so that it could be disposed of by her in any way she likes.

A sole surviving corparcener could dispose of his ancestral property by Will. However if a son is born to him thereafter, he can challenge such a disposition. But a Hindu adopting a son could make a Will of his separate

---

45. *Soorajeemoney Dossey* v. *Denobandoo Malik*, (1861-63) 9 MIA 123: 1 Sar 837 (*per* Lord Justice Bruce).
46. *Beer Pratab* v. *Rajender Pratap*, (1867-69) 11 MIA 1: 9 WR 15; *see* also *Sonam Topgyal* v. *Gompu*, AIR 1980 Sikk 33; *Gumpha* v. *Jaibai*, (1994) 2 SCC 511.
47. *Beer Pratab case*, ante.
48. *Promothanath* v. *Nagendra Bala*, 12 CWN 808.
49. *Kartik Das* v. *Kamad Ghosh*, (2004) 1 HLR 570 (Cal).

property and the adopted son could not challenge it, it being his father's separate property.[50]

6. Probate and letters of administration

In case of Wills to which sub-section (1) of Section 57 of the Indian Succession Act does not apply the executor of the Will is not bound to obtain probate thereof from the court. From the date of the testator's death the estate in the Will vests in its executor. As to the powers, duties, rights and liabilities of executors, etc., the provisions of this Act apply to them though there no probate is granted. However, where the sub-section applies probate is a must, to establish one's rights as an executor. It must be produced before the court, at least before a decree is obtained, so that the plaintiff (executor) can take advantage of the decree.[51]

In case a Hindu dies intestate, it is not necessary to obtain letters of administration. In such cases, i.e. in absence of a probate or letters of administration, a succession certificate can be produced before the court so that the court may grant a money decree against a debtor of the deceased.[52]

7. Bequest to unborn persons

See "Gift to unborn persons" (*supra*). The same rules are applicable here. Now, a bequest can be made to an unborn person subject to limitations laid down by the Indian Succession Act, 1925.

8. Will in favour of female

It is well settled that a gift or bequest to a female should be construed in the same spirit as a gift or Will made in favour of a male.[53]

9. Estates unknown to Hindu law

While making a gift or a bequest it is not within the power and competence of the donor to create by a deed or a Will a new form of estate, or an estate unknown to Hindu law. Similarly he cannot start a new line of inheritance which is inconsistent with the general law of inheritance.[54]

In *Tagore case*[55] the facts were that here a testator made a Will and thereby gave his property to *A* for life, and then to *A*'s eldest son for life. On failure or determination of the above line the property would go to *C*'s heirs.

Thus by the Will the testator wanted to exclude his son *S* totally from taking the estate as he had become a Christian. Moreover the Will started a new line of

---

50. *Raja Venkata Surya* v. *Court of Wards*, 22 Mad 383. See also *P.S. Jairam* v. *P.S. Rama Rao Pissey*, (2004) 11 SCC 320; *Sahdev Singh* v. *Laxmi Chand*, (2003) 1 HLR 471 (P&H).
51. *Shankar Daji Naik* v. *Dattatraya Vinayak Khandulikar*, 45 Bom 1186.
52. For vesting of estate in the executor and his powers, *see* S. 307, Indian Succession Act, 1925.
53. *Nathoo Lal* v. *Durga Prasad*, AIR 1954 SC 355; *Harnam Singh* v. *Mohan Lal*, AIR 1970 J&K 181.
54. *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore*, (1872) IA Supp Vol., p. 47: (1872) 9 Beng LR 377.
55. *Ibid.*

giving estate by adopting primogeniture in the male line through males and it excluded the females and their descendants.

The testator died. At that time *A* had no son. *B*, in the second line, had a son *D* (born during the testator's lifetime). When the Will was made *C* was dead. He had a grandson *F* (born during the testator's lifetime). The son *S* did not get anything under the Will. He therefore filed a suit to set aside the Will.

The Court held that the bequest to *A* was a valid one but all the subsequent bequests were void. Consequently after *A*'s death, *S* would get the whole estate as he was the only heir of the deceased. The estates created in "tail male" (i.e. to *B*'s heirs and to *C*'s heirs) being inconsistent with the Hindu law of inheritance, were therefore void.

10. Power of appointment

When a man is invested with the power to determine the disposition of property of which he is not the owner, he is said to have the power to appoint such property.[56] A Hindu is competent to confer a power of appointment by deed or will on another to regulate the final disposition of his property or estate. On termination of the previously created interest, such a power could be exercised. As observed in *Moti Vahu case*[57], it is not desirable to apply the English law of powers generally to Hindu Wills.

In pure Hindu law no such arrangement existed and this question arose for the first time in *Moti Vahu case*. The Privy Council held that there was no bar to such an appointment and the power can be exercised even in favour of an unborn person subject to limitations and provisions contained in the Transfer of Property Act, 1882 (as regards gifts)[58] and the Indian Succession Act, 1925 (as regards wills).[59] In cases wherein an appointment is made in favour of two or more persons and the appointment is invalid as regards some or one of them, it may still be valid as regards the rest.[60]

11. Direction for accumulation[61]

Direction for accumulation of income can be made effective only so long as the absolute vesting of the entire interest can be withheld or the corpus can be rendered inalienable.[62]

12. Construction of Wills

As laid down by the Privy Council in *Tagore* v. *Tagore*[63], while construing a Hindu Will the words of the Will are to be primarily considered. It is the

---

56. Explanation to S. 69, Indian Succession Act, 1925.
57. *Moti Vahu* v. *Manu Bai*, (1897) 24 IA 93: ILR 21 Bom 709.
58. Ch. II, Transfer of Property Act, 1882.
59. Ss. 113-116, Indian Succession Act, 1925.
60. *Zaver Bai* v. *Kabili Bai*, 16 Bom 492.
61. *See* S. 17, Transfer of Property Act and S. 117, Indian Succession Act.
62. *Amrit Lal* v. *Surnomayee*, ILR (1897) 24 Cal 589.
63. (1872) 9 Beng LR 377.

primary duty of the court interpreting a Will, to ascertain the intention of the testator from the language used by him in the document. In doing so the court should bear in mind "other matters" than merely the words used. These other matters are:

(*i*) the surrounding circumstances;

(*ii*) the position of the testator;

(*iii*) his relation with his family;

(*iv*) the probability that he would use words in a particular sense;

(*v*) his race and religious opinions;

(*vi*) the aims and influences arising from the above; and

(*vii*) the ordinary notions and wishes of Hindus with respect to devolution of property.

Note.—There was an ordinary notion,[64] that as a general rule at all events, women do not take absolute estates of inheritance with power of alienation. However, the Hindu Succession Act, 1956 has made women absolute owners of property they inherit. There is, therefore, no distinction between a gift to a male and a gift to a female; both take absolute estates, and the old presumption of "life-estate only" is abolished.[65]

(*viii*) If by the terms of the Will an absolute estate is given to a woman those terms should not be ignored.[66]

(*ix*) The words of the Will should be given their plain and natural meaning.

(*x*) Where the language is clear and specific the court must construe the words as it finds them and thereby give effect to the testator's intention as expressed in the Will.[67]

(*xi*) From the language used in the document, if its real meaning can be ascertained, mistakes as to names or description, etc should not be allowed to prevent the real meaning being given effect to. Defects in expression should not be allowed to prevent carrying out the testator's intentions.[68] A benignant construction should be adopted.

(*xii*) As observed by the Calcutta High Court,[69] English rules of construction grown side by side with a very artificial system of conveyancing, should be applied to Hindu Wills with great caution. "It is a very serious thing to use such rules in interpreting the

---

64. *Mohd. Shamsul* v. *Sewakram*, (1874) 2 IA 7.
65. *Krishnaswami Ayyar* v. *Ramachandra Rao*, 67 MLJ 821; *Nagasi* v. *Anandji*, 35 Bom LR 952.
66. *Narasimha* v. *Parthasarathy*, 37 Mad 199 (PC); *Mullick* v. *Ranimoni Dassi*, 35 Cal 896 (PC); *Venkatarama Pillai* v. *Parasurama Pillai*, AIR 1948 Mad 81.
67. *Bolo* v. *Koklan*, 32 Bom LR 1596.
68. *Thakur Lalitha Bakhsh Singh* v. *Lala Phool Chand*, AIR 1945 PC 113.
69. *Ram Lal* v. *Kanhai Lal*, 12 Cal 663.

instruments of Hindus, who view most transactions from a different point, think differently and speak differently from Englishmen."

(*xiii*) The donee must be a person capable of taking property under a gift deed or a Will.

(*xiv*) No new form of estate or no new line of inheritance could be started by the donor or testator in order to satisfy his personal whims. *Tagore* v. *Tagore* (supra) is a case on the point.

(*xv*) While making a gift by a gift deed or a bequest by a Will the rules laid down in the Transfer of Property Act and the Indian Succession Act should not be lost sight of.[70]

(*xvi*) Principles governing the construction of a Will apply, by and large, to the construction of a gift.

---

70. Ss. 13-16 of the Transfer of Property Act, 1882; Ss. 113-116 of the Indian Succession Act, 1925.

Chapter X

Religious and Charitable Endowments

SYNOPSIS

A. What is an endowment
B. What is debutter (देवोत्तर) property
C. Public and private endowments: Distinction
D. *Devasthanam* and *Math* Distinctions
E. Requisites of a valid endowment
F. Endowments: Noteworthy points
G. Religious and charitable uses
   1. Creation of endowments
   2. Essentials of a valid endowment
   3. Illusory endowments
   4. Dedication
   5. Categories of endowments
      Endowments for uncertain objects
      Endowments for definite, objects
   6. Burden of proof
H. *Shebait*: His position, powers and duties
   1. Right to offerings
   2. Delegation of authority
   3. Devolution of office of a shebait
I. *Mahant*: His position, rights and liabilities
   1. Presumption as to property in possession of a *Mahant*
   2. Devolution of *Mahant's* office
J. Removal of *Shebaits* and *Mahants*
K. Alienation of debutter property
   Burden of proof
L. Rights of the founder
M. Doctrine of *cy pres*: When applicable
N. Limitation

A. WHAT IS AN ENDOWMENT

An endowment is generally a dedication of property of any kind for particular purposes, particularly charitable purposes.[1] One may say that it is the dedication of property for a well-defined religious or charitable purpose or for the benefit of the public or some section of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind.

The legal literature on this subject is very scanty. The reason seems to be that religious endowments were regulated by their own customs.[2] Law on this subject is mostly Judge-made law.

Gifts for religious or charitable purposes had their source in charity and a desire to acquire religious merit.[3] They fall into two divisions: *Ishta* and *Purtta*: the former meant sacrifices and sacrificial gifts and the latter meant charities. The former led to heaven while the latter to emancipation or *Moksha*. This

---

1. Walker: *Oxford Companion to Law*, 1980, p. 412; see *P.N. Desai* v. *Dy. Charity Commr.*, 1987 Supp SCC 714, 721: AIR 1987 SC 2064.
2. B.K. Mukherjee: *Tagore Law Lectures*, (1951), *The Hindu Law of Religious and Charitable Trusts*, (1979), p. 7; *Modern Hindu Law*, p. 1020.
3. *Mayne's Hindu Law & Usage*, 10th Edn., (1938), Chap. XXII, p. 913.

shows that charity is placed on a higher footing than religious ceremonies and sacrifices.[4]

Temples and processions for deities, it must be noted, were considered as charitable acts (i.e. *Purtta*), while hospitality was considered as a sacrificial gift (i.e. *Ishta*).

As observed by the Supreme Court, "Endowment'' is dedication of property for purposes of religion or charity, having both the subject and object certain and capable of ascertainment. A trust in the sense in which the expression is used in English law is unknown in the Hindu system, pure and simple. Human piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind and for all purposes considered meritorious in the Hindu social and religious system. Under the Hindu law the image of a deity of the Hindu pantheon is, as has been aptly called, a ''juristic entity'', vested with the capacity of receiving gifts and holding property. The Hindu law recognises dedication for establishment of the image of a deity and for maintenance and worship thereof. The property so dedicated to a pious purpose is placed *extra commercium* and is entitled to special protection at the hands of the sovereign whose duty it is to intervene to prevent fraud and waste in dealing with religious endowments.[5]

The distinction between religious and charitable endowments in Hindu law, one should remember, is a modern one.[6]

B. WHAT IS DEBUTTER (देवोत्तर) PROPERTY

Religious endowments are of two types: (*i*) public and (*ii*) private.

In a public endowment the dedication is for the use or benefit of the public. When property is set apart for the worship of a family god, wherein the public is not interested, the endowment is a *private one*.

The subject of religious or charitable uses may be any property which a Hindu may validly dispose of by gift or will. *Property dedicated to religious uses is called debutter property.*

C. PUBLIC AND PRIVATE ENDOWMENTS: DISTINCTION

Religious endowments are either (*i*) public or (*ii*) private. When the dedication is made for the benefit of the public, the endowment is public; when property is set apart for the worship of the family idol in which the public are not interested, the endowment is private.[7] However, the mere fact that Hindu

---

4. *Ibid.*; *Manohar Mukherji* v. *Bhupendra Nath*, (1933) 60 Cal 452; see also *Manusmriti*, Chap. 4, Verses 226 & 227.
5. *Pratap Singhji N. Desai* v. *Dy. Charity Commr., Gujarat*, 1987 Supp SCC 714, 721: AIR 1987 SC 2064.
6. *Ibid.*; see also *Parmanand* v. *Nihalchanda*, AIR 1938 PC 195: (1938) 65 IA 252 (for distinction).
7. *Tikayat Govindlalji* v. *State of Rajasthan*, AIR 1962 Raj 196: (1962) 12 Raj 406.

worshippers are generally allowed to worship, a temple would not change its character, one way or the other. It does not become a public one.[8] However, it must be noted that public worship is one of the important tests for finding out whether a religious endowment is a private one or a public one.[9] Private religious endowment could be conceived only in Hindu law. It is not possible in English law. In this sense it becomes a unique feature of Hindu law as observed by the Supreme Court.[10] Whether an endowment is public or private depends upon the intention of the founder as expressed by him in the document.[11]

Another point of distinction between public and private endowment is that in a public trust the beneficial interest is vested in an uncertain and fluctuating body of persons, either the public at large or some considerable portion of it answering a particular description; whereas in a private trust the beneficiaries are definite and ascertained individuals or who within a definite time can be definitely ascertained.[12] A number of factors are to be considered by the court in deciding whether a temple is public or private.[13] Shri Nathji Temple at Nathdwara is a public temple as decided by the Supreme Court.[14]

In a private endowment all the members of the family by their joint action can transfer the endowment with the idol to another family by means of a gift. This is not possible in public endowment.

In the case of a private endowment the consensus of all the members of the family may convert a debutter property into a secular one, i.e. they can put an end to it; while in the case of a public religious endowment the heirs of the founders have no right to put an end to the dedication.[15]

D. DEVASTHANAM AND MATH

The Hindu ecclesiastical system recognises two types of religious institutions:

(*i*) Temples or *Devasthanams*, and

(*ii*) Monastries or *Maths*.

---

8. *Gowrhai* v. *Sharda*, (1845) 23 Pat 917; *Radha Krishna* v. *Laxmi Narain*, (1949) 23 Luck 193.
9. *Kaviram Ramchand* v. *Hazari Dharamsingh*, 1960 Nag LJ (Notes) 96. Facts indicating that a temple is a public one shown in *Mahalaxmi* v. *Shah Ranchhoddas*, (1969) 2 SCC 853: AIR 1970 SC 2025.
10. *Radha Kant Deo* v. *Commr. of Hindu Religious Endowments*, (1981) 2 SCC 226: AIR 1981 SC 798.
11. *State of Bihar* v. *Charushila Dasi*, AIR 1959 SC 1002.
12. *Shyam Sunder Das* v. *Laxmi Narayan Thakur*, ILR 1960 Cut 92; *Pratap Singhji N. Desai* v. *Dy. Charity Commr.*, 1987 Supp SCC 714, 723: AIR 1987 SC 2064.
13. *Ranchhod Das* v. *Goswami Shri Mohalakshmi*, AIR 1953 Bom 153: ILR 1953 Bom 217.
14. *Shankarlinga* v. *Rajeshware*, 35 IA 176: 31 Mad 236.
15. *Gobinda Kumar Roy* v. *Debendra Kumar Roy*, 12 CWN 98; *Konwar Doorganath Roy* v. *Ram Chunder Sen*, 2 Cal 341 PC. Also see *Kuldip Chand* v. *Advocate General to Govt. of A.P.*, (2003) 5 SCC 46: AIR 2003 SC 1685 (guidelines to determine the nature of dedication laid down); *Kacha Kanti Seva Samiti* v. *Shri Kacha Kanti Devi*, (2003) 4 SCC 665 (to be decided on the basis of facts proved in each case).

Temples or *Devasthanams* are places of worship. Large endowments in the shape of lands, assignment of public revenue and jewellery are made to temples.

Monastries or *Maths* are places whose main purpose is the spread of religious knowledge through instruction to the disciples and the followers of the *Math*. The Supreme Court in *Shri Krishna Singh case*[16] has aptly observed that "A *Math* is an institutional sanctum presided over by a superior who combines in himself the dual office of being the religious or spiritual head of the particular cult or religious fraternity, and of the manager of the secular properties of the institution of the *Math*".

Distinctions

The following distinctions can be drawn between a *Devasthanam* and a *Math*:

The primary distinction between the two is that the central part of the temple is the idol, while in the Math the presiding element is not the deity but the *Mahant* or ascetic or religious teacher with disciples forming a spiritual brotherhood.[17]

The manager of a *Devasthanam* is called a *Shebait*,[18] while the manager of a *Math* is called a *Mahant*.

A *Shebait* (known as धर्मकर्ता also) is in the position of a trustee as regards temple property. But in the case of a Math its property vests in trustees other than a *Mahant*. Under Hindu law, *Maths*, Choultries and similar institutions are a class of foundations and they have been raised to the status of a juristic person who can become the bearer of rights and duties.[19]

The *Shebait* is the administrator of the temple property. A mahant's functions and rights are regulated by custom.

So far as devolution of the office of the former is concerned, it depends upon the terms and conditions of the deed or will whereby the endowment is created.[20] Failing this, succession is governed by the line of inheritance from the founder.[21] In the case of a Math succession to a *Mahant's* office depends upon the rules made for the purpose. In some cases the holder of the place may nominate his successor or he may be elected by all the members of the *Math*.

E. REQUISITES OF A VALID ENDOWMENT

(1) The author or settlor must be competent to settle it.

(2) Its object must be either religious, or charitable or both.

16. *Shri Krishna Singh* v. *Mathura Ahir*, (1981) 3 SCC 689.
17. *Jagannath Mahaparu* v. *Kumar Bimal Chandra Singh*, 25 Cut LT 345.
18. *Pramatha Nath Mullick* v. *Pradyumma Kumar Mullick*, 49 MLJ 30 PC: 30 CWN 25.
19. *Jagannath Mohaparu* v. *Kumar B.C. Singh* (supra).
20. *Mahant Bishambhar Das* v. *Thakur Drigbijai Singh*, 9 CWN 914.
21. *Madhub Chandra Bera* v. *Rani Sarat*, 15 CWN 126.

(3) The dedication must be unambiguous and bona fide.

(4) Dedication must be for a definite or certain purpose or object.

(5) Property dedicated must be ascertainable.

(6) The dedication must not be made in contravention of any provision of law.

F. ENDOWMENTS: NOTEWORTHY POINTS

The following are noteworthy points[22] in respect of endowments. A summary of law on this topic is aptly given by the Allahabad High Court in *Ram Krishan Mission case*[23].

(1) The rule against perpetuity does not apply; (2) Unlike English law, endowments are valid even if made for superstitious purposes; (3) The Indian Trusts Act does not apply to public or private, religious or charitable endowments; (4) Section 123 of the Transfer of Property Act which requires that a gift of land must be by a registered instrument does not apply; (5) The Religious Endowments Act, which applies to public endowments does not apply in Mumbai State, except in North Canara; (6) When, however, the object is uncertain and vague (e.g. a gift or bequest to Dharma) and does not admit of its administration being controlled by the Court, the endowment is void.[24]

A dedication by a Hindu for religious or charitable purposes is neither a "gift" nor a "trust" in the strict legal sense. Religious endowment does not create title in respect of the property dedicated in anybody's favour.[25] Such property here becomes *res millins*.[26]

G. RELIGIOUS AND CHARITABLE USES

The following endowments are considered to be religious and charitable:

(*i*) Feeding the poor or Brahmins.

(*ii*) Worship of the family deity.[27]

(*iii*) Performance of religious ceremonies like *Sraddha* of one's own self and of one's ancestors.[28]

(*iv*) Propagation of Nama Dharma and continuance of Sraban Kirtan Dharma.[29]

---

22. *Ranchhoddas* v. *Parvati Bai*, 23 Bom 725; M.D. Manek: *A Handbook on Hindu Law*, Chap. XVIII.
23. *Ram Krishan Mission* v. *Dogar Singh*, AIR 1984 All 72.
24. *Ranchhod Das* v. *Parvati Bai*, 23 Bom 725; M.D. Manek: *A Handbook on Hindu Law*, Chap. XVIII.
25. *Thayarammal* v. *Konakammal*, (2005) 1 SCC 457: AIR 2005 SC 1588.
26. *See* Section 122, Transfer of Property Act, 1882; Section 3, Trusts Act, 1882.
27. *Saraswati Ammal* v. *Rajagopal Ammal*, AIR 1953 SC 491.
28. *Ibid.*
29. *Harendra Nath Bhattacharya* v. *Kaliram Das*, (1972) 1 SCC 115: AIR 1972 SC 246.

(*v*) Founding a hospital.

(*vi*) Endowment for a university.

(*vii*) Making a gift for founding a *Sadavrata* at a specified place.

(*viii*) Arrangement with executors of the estate to distribute the same among poor relatives and servants of the testator.

Entombment of the settler and worship at his tomb (समाधि) is not a religious or charitable object.[30] However if the समाधि is that of a great saint who is deified and worshipped, it is a valid endowment.[31] A business of newspaper publishing for profit motive[32] and constitution of Akhada[33] अखाडा is not for a religious or charitable ground but this is a question of fact.[34] Superstition cannot take and should not be allowed to take place of Religion.

As stated in the beginning, under Hindu law gifts were impelled by a desire to acquire religious merit. However, under the Charitable Endowments Act, 1890 the following purposes are considered to be religious and charitable endowments:

(*i*) Relief to the poor, (*ii*) promotion of education, (*iii*) medical relief to the sick, (*iv*) advancement of any other object of general public utility.

According to the Transfer of Property Act, 1882[35] a public, religious and charitable trust is, in effect, a transfer of property for the benefit of the public for the following four divisions:

(*i*) Advancement of religion, (*ii*) of knowledge, (*iii*) of commerce, health and safety of the public, and (*iv*) for any other object beneficial to mankind.

1. Creation of endowments

A Hindu may dedicate for religious or charitable purposes any property which he can dispose of by will or gift. He can dedicate even the whole of his property.

As laid down in *R.V. Reddiar* v. *Krishnaswami*[36] by Ramkrishnan, J. no particular words are necessary to constitute a dedication or a trust. No writing is even necessary in case of dedication to an idol which cannot physically hold the property. No express words of gift to the idol are necessary;[37] dedication to an idol may be inferred from user, that is by application of the proceeds. Even landed property may be dedicated by the *Karta* of a joint family without any instrument.[38]

---

30. *Malayammal* v. *A. Malayalam Pillai*, 1991 Supp (2) SCC 579.
31. *Saraswathi Ammal* v. *Rajagopal Ammal*, AIR 1953 SC 491.
32. *Sole Trustee, Lok Shikshana Trust* v. *CIT*, (1976) 1 SCC 254: AIR 1976 SC 10.
33. *Pt. Ram Chandra Shukla* v. *Mahadevji Mahabirji*, (1969) 3 SCC 700: AIR 1970 SC 458.
34. *Rishikul Brahmacharya Ashram Committee* v. *State of Uttaranchal*, (2005) 9 SCC 254.
35. S. 18; *see also* Indian Succession Act, S. 118 and Mumbai Public Trusts Act, 1950, S. 9.
36. AIR 1971 Mad 262.
37. *Manohar Ganesh Tambekar* v. *Lakhmi Ram Govindram*, (1888) 12 Bom 247; *Gadicherala Venkatanarasimha Rao Guru* v. *Nyapathi Subba Rao*, (1923) 46 Mad 300: 73 IC 991.
38. *Tadi Bulli Gangi Reddi* v. *Tadi Bulli Tammi Reddi*, AIR 1927 PC 80: 45 CLJ 512.

What is necessary is that the object or religious purpose of the donor should be clearly specified; the property intended for the purpose should be set apart or dedicated for the purpose and the executant must divest himself of all rights in the property. If he has not done so, the endowment stands void, being illusory.

If the endowment is made by a will, the Will must be in writing, signed by the testator and attested by at least two witnesses where the case is covered by the Indian Succession Act. Property may be bequeathed in trust to an idol or, where the idol is not installed, for the establishment of an image. In such a case if at the time of the testator's death the idol does not exist, the bequest stands valid.

2. Essentials of a valid endowment

From what has been stated above, one may note down the essentials of a valid endowment.

(*i*) the creator of an endowment must have the capacity to make it;

(*ii*) it must not be opposed to any law in force;

(*iii*) the subject-matter of the endowment must be specific;

(*iv*) the object of the endowment must also be definite; and

(*v*) dedication of property must be complete.

To create an endowment no writing is necessary except where it is made by a will in which case the will must be in writing signed by its author and attested by at least two witnesses if the case comes within the Indian Succession Act.[39]

The testator-donor must have the capacity to settle the endowment, i.e. he must be a major and of sound mind. He should not suffer from any legal disability so as to render him unfit to create an endowment. Similarly if the endowment is made with the intention to defeat or delay the creditors or in fraud of creditors[40] or is made within two years of the insolvency of the transferor, it is invalid and void.

The subject-matter of the endowment must not be uncertain, indefinite and ambiguous. If it is so, it is fatal to its creation. In this regard the mode of dealing with the property is the test whether the endowment is real or fictitious and whether the executant has divested himself of the property.[41]

Lastly, the object of the endowment must be definite and the dedication must be for charitable purposes. In other words the object of the endowment must be clearly spelt out; if not, the same would not create an endowment. For

---

39. *R.V. Reddiar* v. *Krishnaswami*, AIR 1971 Mad 262.
40. *Sri Sri Kalimata Debi* v. *Nagendra Nath Chakraborty*, 44 CLJ 522: 99 IC 917: 1927 Cal 244; *Ram Chandra Mukerjee* v. *Ranjit Singh*, 27 C 242.
41. *Narendra Nath Mondal* v. *Radha Binode Mondal*, AIR 1925 Cal 996; *see* also *Sri Sri Kalimata Debi* v. *Nagendra Nath Chakraborty*, 1927 Cal 244: 41 Cal LJ 396.

example, an endowment created for the purpose of "Dharma" is invalid on the ground of uncertainty.[42]

3. Illusory endowments

As said before for the validity of a deed of endowment the executant must divest himself of the property. The dedication should be real and not illusory. Mere execution of a deed is not enough to constitute a valid endowment[43] because it may be that the real object of the executant may be to defraud creditors, or to defeat the provisions of the ordinary law of descent, or to restrain alienations and to keep the property in perpetuity in the family. Whether the executant has divested himself of the property or not can be determined by his subsequent acts and conduct.[44] There cannot be dedication with the condition that it may be terminated at any time with the consent of adult members of the family.[45] An absolute grant is therefore necessary to constitute a trust.[46]

If the executant appropriates the profits of the property for his own use and not for the worship of the idol, and his subsequent dealings with the property show that he did not intend to create an endowment, the dedication will be inoperative and the property cannot be treated as debutter property. The property in such a case continues to be his and it may be attached in execution of a decree against him.[47] Similarly if property is purchased in the name of an idol and the idol is not set up for public worship and no priest is appointed for the idol, the property remains the executant's own private property.[48]

4. Dedication[49]

At the outset it is quite necessary for the executant donor to dedicate the property fully and completely for the endowment. Dedication consists of two things: (*i*) *Sankalpa*, i.e. an intention to dedicate and (*ii*) *Utsarga*, i.e. renunciation.[50] Whether he has done so or not could be found out from his acts contemporaneous with, as well as acts and conduct subsequent to the foundation.[51] There must be a clear and unequivocal manifestation of intention

---

42. *Nirmala Bala* v. *Balai Chand*, AIR 1965 SC 1874.
43. *Sunder Singh Mallah Singh Sanatan Dharma High School Trust* v. *Managing Committee S.M. Rajput High School*, 40 BLR 724 (PC).
44. *M.A. Ramanuja Charyulu* v. *Sarla Charyulu*, AIR 1974 AP 316.
45. *Surendra Krishna Roy* v. *Shree Shree Ishwar Bhubaneshwari*, 1933 Cal 295.
46. *Madhub Chandra Bera* v. *Rani Sarat Kumari Debi*, 15 CWN 126.
47. *Bhekdhari Singh* v. *Shri Rama Chanderji*, (1931) 10 Pat 388: 136 IC 290; *Gopu* v. *Sami*, (1905) 28 Mad 517.
48. *Brojosoondery* v. *Luchmee*, (1873) 20 WR 95 (PC).
49. *Deoki Nandan* v. *Murlidhar*, AIR 1957 SC 133 (dedication must be bona fide) *Sonatun Bysack* v. *Juggutsoondsea Dossee*, (1859-61) 8 MIA 66: 1 Sar 721 (dedication must not be illusory); *Menakuru Dasaratharami Reddi* v. *Duddukuru Subba Rao*, AIR 1957 SC 797 (Settlor's conduct is the index of his *bona fides* in the matter.
50. *Sankalpa*, *Utsarga* and *Pratistha* are the three steps to make the dedication full and absolute.
51. *Sunder Singh Mallah Singh Sanatan Dharma High School Trust* v. *Managing Committee*, *Sunder Singh Mallah Singh Rajput High School*, 40 BLR 724.

to dedicate and there must be a clear change in the tenure of the property. If it is so, the dedication is complete.[52] As decided by the Privy Council and as reiterated by the Supreme Court of India in *Pratap Singhji case*[53] the effect of a valid deed of dedication is to place the property comprised in the endowment *extra commercium* and beyond the reach of creditors. Thus, dedication must be real and not illusory.

If the dedication is complete, a trust in favour of a public religious charity is created.[54] If, on the contrary, it is partial, a trust in favour of the charity is not created but a charge in favour of the charity is attached to, and follows the property which retains its original private and secular character.[55] In essence, the dedication should be absolute, complete and must cover the entire or substantial beneficial interest which the executant had in the property. In partial dedication the deity does not become the owner of the dedicated property but it is in the position of a charge holder in respect of the same. The property thus becomes subject to the charge in favour of the idol.[56]

The question whether a dedication is partial or complete depends upon the construction of the instrument of grant as a whole.[57] It is a question of fact to be determined in each case in the light of the material terms used in the document.[58]

Dedication of property absolutely for religious or charitable purposes are exempt from the rule against perpetuity. In case of partial dedication, the part of the trust creating perpetuity in favour of religious or charitable purposes is valid, but creation of a perpetuity in favour of a donee is invalid. Consequently the property will pass on as intestacy, but subject to the trust.

5. Categories of endowments

As observed in *Byreddi case*[59] grants in favour of idols or religious endowments fall into four categories:

(*i*) A complete dedication whereby the entire beneficial interest in the property is conveyed to the idol or religious institution;

(*ii*) A dedication to the idol or religious institution subject to a charge as to part of the income in favour of a private person;

---

52. *Jai Dayal* v. *Dewan Ram Saran Das*, AIR 1938 Lah 686.
53. *Pratap Singhji N. Desai* v. *Dy. Charity Commr.*, 1987 SCC Supp 714, 721: AIR 1987 SC 2064.
54. *Nirmala Bala* v. *Balai Chand*, AIR 1965 SC 1874.
55. *Ibid.*
56. *Panchanan Dalai* v. *Laxmidhar Dalai*, ILR 1957 Cut 712; *see* also *Narayan Pillai* v. *Dharmar*, (1972) 1 MLJ 95.
57. *Pande Har Narain* v. *Suraj Kumari*, 48 IA 143: 43 All 291 (PC); *Nirmala Bala* v. *Balai Chand*, AIR 1965 SC 1874.
58. *S. Shanmugham Pillai* v. *K. Shanmugham Pillai*, (1972) 2 SCC 312: AIR 1972 SC 2069.
59. *Byreddi Narasi Reddy* v. *Thamballa Balamma*, AIR 1963 AP 130; *Menakuru Dasaratharami Reddi* v. *Duddukuru Subba Rao*, AIR 1957 SC 797.

(*iii*) A gift only with reference to a part of the income in favour of the idol or religious establishment and the disposal of the surplus for a purpose unconnected with the trust; and

(*iv*) A grant of the property to a private person subject to a charge in favour of the idol or the religious establishment in respect of a portion of the income for the purposes of service.[60]

The nature of grant as to whether a dedication is complete or not is a question of fact.[61]

Endowments for Uncertain Objects:

1. Purposes of popular usefulness or of charity as may be thought proper unanimously by the executers of the will.[62]
2. Disposal of property in a righteous manner, in a pious and charitable way as advisable to the executors . . . . . in such a manner that people may speak well of the settlor and his heirs may get great fame.[63]
3. Donation of property to an agnate or to a Brahmin residing in ancestral house of the Settlor.[64]
4. Use in good deeds (सत्कर्म or सत्काम).[65]
5. Use in pious deeds.[66]
6. Religious, educational or philanthropic purposes.[67]
7. Spread of Hindu religion and spread of Sanskrit language.[68]
8. For a political purpose or object is invalid as the court cannot play a political role.

Endowments for Definite Objects:

1. Establishment of a definite सदाव्रत at some definite place.[69]
2. Performance of annual श्राद्ध rites of donor.[70]
3. Such charities as the Trustees may think deserving.[71]

---

60. *Byreddi Narasi Reddy* v. *Thamballa Balamma*, AIR 1963 AP 130; *Menakuru Dasaratharami Reddi* v. *Duddukuru Subba Rao*, AIR 1957 SC 797.
61. *Ibid.*
62. *Trikamdas Damodhar* v. *Haridas Morarji*, ILR (1907) 31 Bom 583: 9 Bom LR 560.
63. *Nanalal Lallubhoy* v. *Harlochand Jagusha*, ILR (1890) 14 Bom 476.
64. *Shyama Charan Bhattacharya* v. *Sarup Chandra Sen*, (1913) 17 Cal WN 39: 14 IC 705.
65. *Bai Bapi* v. *Jamnadas Hathising*, ILR (1898) 22 Bom 774.
66. *Satkarli Bhattacharya* v. *Hazarilal Khanna*, ILR (1931) 58 Cal 1025: AIR 1932 Cal 44: 134 IC 1065.
67. *Harilal Chhaganlal Desai* v. *Bai Manjoola*, AIR 1936 Bom 13: 160 IC 194.
68. *Gadicherala Venkatanarasimha Rao* v. *Nyapathy Subba Rao*, ILR (1923) 46 Mad 300: AIR 1923 Mad 376: 17 Mad LW 31.
69. *Morarji Cullianji* v. *Neubai*, ILR (1893) 17 Bom 351.
70. *Malayammal* v. *A. Malayalam Pillai*, (1991) Supp 2 SCC 579.
71. *Smith* v. *Massey*, ILR (1906) 30 Bom 500: 8 Bom LR 322.

4. Performance of ceremonies and ब्रह्मभोजन.[72]

5. Distribution of property among the poor relations, dependants and testator's servants.[73]

6. Dedication in favour of a definite deity and keeping apart property for the purpose.[74]

(Note: In this connection see "Doctrine of Cy press", infra, at '*M*'.)

6. Burden of proof

The burden of proof lies on the party who sets up a case to show that the property has been inalienably dedicated to a temple.[75]

H. SHEBAIT: HIS POSITION, POWERS AND DUTIES

A *shebait* is a person who is a mere manager of the debutter property. Although his rights and duties to some extent resemble those of a trustee, he is not a trustee in the true legal sense of the term, inasmuch as the property of the estate is not vested in him.[76]

A *shebait* is the *pujari* of a deity. Though not appointed as *shebait*, if he is performing *pooja* and acting as a *purohit* for a long time, he can be regarded as a *de facto shebait*.[77]

Shebaitship involves two things: (*i*) the ministrant or servant of the deity and (*ii*) the manager or administrator of the properties attached to the temple. He is not the owner of the temple property. Having only the title of a manager but not having a legal ownership he consequently has a right to possess the property on behalf of the idol.[78] As laid down by the Allahabad High Court in *Kishore* v. *Guman Behari*[79], that normally, it is the *shebait* alone who can file a suit on behalf of an idol, but it is also equally well settled that in exceptional circumstances persons other than the *shebait* can also institute a suit on behalf of an idol. As a manager he is entitled to the custody of the idol and its property. In case of offerings made to the idol, they belong to the temple if they are of a permanent character. However, if the offerings are of a perishable nature they belong to the *shebait*.

As regards the debutter property, a *shebait* is bound to do whatever is necessary for its benefit, preservation and protection. For this purpose he may incur expenses to keep up the religious worship, to repair the temple or other

---

72. *Laxmishankar* v. *Vajnath*, ILR (1882) 6 Bom 24.
73. *Manorama Dassi* v. *Kali Charan Banerjee*, ILR (1904) 31 Cal 166: 8 Cal WN 273.
74. *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra*, ILR (1910) 37 Cal 128.
75. *Thakur Mukund Singh* v. *Mahant Prem Das*, 1922 Nag 122: 67 IC 258.
76. *Maneendra Deb Ray* v. *Dheerendra Deb Ray*, 63 Cal 629.
77. *Kacha Kanti Seva Samiti* v. *Smt Kacha Kanti Devi*, (2003) 4 SCC 665.
78. *Gobinda Das Nath* v. *Shyama Charan Nath*, AIR 1940 Cal 478.
79. AIR 1978 All 1.

possessions of the idols, institute or defend hostile litigation and prevent the property from being sold in execution of a decree binding upon the temple.

Though not a trustee in the legal sense of the term the shebait is in the position of a trustee. He therefore cannot purchase any part of the debutter property either directly or indirectly. However, he is entitled to be reimbursed for out-of-pocket expenses made by him in the management of the property.

A *shebait* can file a suit on behalf of and in the name of the idol or the image.[80] In order to vindicate his right to sue for protection of temple properties he may file a suit in his own name. Since the idol can sue through the manager and the manager or the accredited agent who is generally the shebait can sue in his own name, these rights could be exercised only by one or the other, but not by both. If a suit filed by one is decided, the other cannot sue on the same cause of action which has already merged in the decree obtained in the former suit.[81]

A third party may sue only in cases wherein he can show that he has a personal interest in the idol.[82]

There may be one or more *shebaits* of a temple.

1. Right to offerings

See above.

2. Delegation of authority

Neither a trustee nor a *shebait* can delegate his authority. He can, however, appoint a sub-agent and such appointment must only be as a means of carrying out his own duties himself and not for the purpose of delegating those duties by means of such appointment.

3. Devolution of office of a shebait

When the worship of an idol is founded, the rights of *shebaitship* are vested in the founder and his heirs, unless the same have been disposed of otherwise by any deed or will by which it is created or there has been some usage or course of dealing which points to a different mode of devolution.[83] The interest of the shebait is heritable and as observed in *Shahzad Kumar case*[84] it follows the line of inheritance from the founder. Even females can succeed to the religious office of shebaitship and get priestly duties performed by a substitute or *Pujari*, unless there is a usage to the contrary which is to be pleaded and established.[85] However, the duties to be performed must be such as a woman can perform.

---

80. *Tarit Bhushan Rai* v. *Sri Sri Ishwar Shridhar S.S. Thakur*, AIR 1942 Cal 99.
81. *Shri Mhadba Devasthana* v. *Mhadba Ramji Bidakar*, 54 Bom LR 645.
82. *Kisan Bhagwan Marathe* v. *Shree Maroti Saunsthan*, AIR 1947 Nag 233.
83. *Raj Kali Kuer* v. *Ram Ratan Pandey*, AIR 1955 SC 493: (1955) 2 SCR 186.
84. *Shahzad Kumar* v. *Raja Ram Karan*, AIR 1965 SC 254.
85. *Ibid.*; see also *Raj Kali Kuer* v. *Ram Ratan Pandey*, AIR 1955 SC 493.

This right of *shebaitship* is a recognised form of property and like any other secular property it can be succeeded to. The office of *shebaitship* combines in it both the elements of office and property[86] and it being heritable is governed by the Law of Succession.[87] *Shebaitship*, therefore, can be the subject-matter of a testamentary instrument and can be validly disposed of by a Will.[88]

As observed by the High Court of Patna,[89] in the case of a temple, succession to the office of a shebait is governed by the terms of the grant,[90] and in the absence of such a provision, by custom or usage of the institution.[91] If there is no such custom, the right passes to the founder and his heirs, provided the person on whom the office devolves is not unfit, according to the usages of worship, to perform the duties of office.

There are cases which have laid down that the founder cannot lay down a line of succession for *shebaitship* which is against the general law.[92] There is also a contrary view which holds that it is competent for an heir of a founder to create a new line of succession on failure of the original line of succession.[93]

To the vexing question whether a shebait can nominate a successor by will, the High Court of Mumbai answers in the affirmative while the High Courts of Kolkata and Allahabad hold to the contrary.

When the office of *shebaitship* devolves on more persons than one they may arrange for the executions of the functions of the office jointly, or by turns, or if a right to receive offerings is attached to the office, they may sue for partition and have their respective periods of service fixed by the Court.[94] If they are *Mitakshara* joint family members, the senior male member is entitled to the management of the property. Where no such right to receive offerings is attached, no suit will lie for division of their right and in such a case the property would be managed by them jointly.

I. MAHANT: HIS POSITION, RIGHTS AND LIABILITIES

The position of a mahant is a combination of office and proprietary right. In other words, with this office of Mahantship, both the elements of office and

---

86. *Kalipada Chakraborti* v. *Palani Bala Devi*, AIR 1953 SC 125.
87. *Jankiram Pt. Mira* v. *Koshalyanandan*, AIR 1961 Pat 293.
88. *Banku B. Das* v. *Kashi N. Das*, AIR 1963 Cal 85; Orissa High Court differs from this proposition vide *Bairagi Das* v. *Uday Chandra Mahatab*, AIR 1965 Ori 201.
89. *Anuragi Kuer* v. *Parmanand Pathak*, AIR 1939 Pat 1.
90. *Mahant Bishambhar Das* v. *Thakur Drigbijai Singh*, 9 CWN 914.
91. *Ananda Chandra Chuckerburty* v. *Braja Lal*, 36 CLJ 356.
92. *Hiranbala Devi (Smt)* v. *Bhattacharya*, AIR 1976 Cal 404; *Monohar Mukherjee* v. *Bhupendra Nath Mukherjee*, 37 CWN 29: 1932 Cal 791; *P.N. Mukerjee* v. *A.C. Banerjee*, 40 CLJ 564; *Sripati Chatterjee* v. *Khudiram Banerjee*, 41 CLJ 22 [overruling *Sripati Chatterjee* v. *Khudiram Banerjee*, 1925 Cal 442; *Ganesh Chander Dhur* v. *Lal Behary Dhur*, 1936 PC 318: 38 Bom LR 1250: 17 Pat LT 801: 41 CWN 1 (PC)].
93. *Kandarpamohan Goswami* v. *Akshaychandra Basu*, 60 Cal 706.
94. *Pramathnath* v. *Pradyumna Kumar*, AIR 1925 PC 139: 52 IA 245: 52 Cal 809 (PC); approving *Mitta Kunth Audhicarry* v. *Neerunjun Audhicary*, 14 Beng LR 166.

property, of duties and personal interest, are blended together and neither can be detached from the other.[1] As observed by the Supreme Court in *L.T. Swamiar case*[2], a *Mahant* is the head of a Math. He has not only duties to discharge in connection with the endowment, but he has a personal interest of a beneficial character which is sanctioned by custom and is much larger than that of a *shebait* in the debutter property. His personal or beneficial interest aforesaid is manifested in his larger powers of disposal and administration and the right to create derivative tenures in respect to endowed properties. These and other rights of a similar character invest his office with the character of a proprietary right which, though anomalous to some extent, is still a genuine legal right.[3]

Mahantship is not heritable like ordinary property and the ordinary rules of succession do not apply to it. The simple reason is that a *Mahant* is generally an ascetic and his connection with his natural family is completely cut off.

Obligations and duties of a *Mahant* are governed by custom and usage of the particular *Math*. Though not a trustee in the English sense of the term[4], he is answerable as a trustee in the general sense, for proper administration. In fact, with respect to the endowment he occupies a fiduciary position.

He being an ascetic, offerings made to such a person are not made to him personally and for his personal benefit; they are made to the institution itself. The natural heirs of a *Mahant*, therefore, can lay no claim to them.[5]

For his personal benefit, and for purposes unconnected with the dignity of his office he cannot spend anything out of the surplus income of the *Math*.[6] Similarly he cannot spend for illegal, immoral or wicked purposes.[7] Except in case of necessity, he has no right to create any interest in the *Math* property to endure beyond his lifetime.

There may be one or more shebaits as said before, but there can be only one head of a *Math*, i.e. *Mahant*.

He has no right to alienate his right of management because he is in the position of a trustee.

1. Presumption as to property in possession of a Mahant

Simply because a *Mahant* is an ascetic, that does not raise a presumption that property in his possession is not his personal property. Strictly speaking

---

1. *Commr., H.R.E.* v. *Shri Laxmindra Tirtha Swamiar*, AIR 1954 SC 282; 1954 SCR 1005: *Jagannath* v. *Byomkesh*, AIR 1973 Cal 397 (part of income can be appropriated by a *shebait*).
2. *Ibid.*
3. *Ibid.*
4. *Motidas* v. *S.P. Sahi*, AIR 1959 SC 942; *Kaviram Ramchandra* v. *Hazari Dharam Singh*, 1960 NLJ (notes) 96.
5. *Krishna Singh* v. *Mathura Ahir*, AIR 1972 All 273.
6. *Sudhindra Thirtha Swamiar* v. *Commr. for Hindu Religious and Charitable Endowments*, AIR 1963 SC 966.
7. *H.H. Sudhindra Thirtha Swamiar* v. *Commr. for Hindu Religious and Charitable Endowments*, AIR 1956 Mad 491.

there is no presumption either way. The burden of proof in such cases lies on the plaintiff to prove that the property belongs to him.[8]

2. Devolution of Mahant's office

Mahantship is not hereditary, i.e. on the death of an existing *Mahant* his *Chela* (disciple) does not succeed to the office as a matter of course. He acquires right only by appointment and this authority to appoint rests in the Bhekh and the Sewaks.[9] Succession to this office will be governed by the rules of devolution which are laid down by the founder of the endowment.[10] Such rules, however, should not violate the provisions of any law. If no such rules exist the devolution is governed by the usage of each particular *Math*. As said by the Privy Council generally the *Mahant* has the right to nominate his successor in his lifetime or by will. Such a custom prevails in a majority of *Maths*. If the *Mahant* fails to use his right an election is usually made from the disciples, if any, of the deceased Mahant, and failing them, anyone of his spiritual kindred like *Gurubhai*, *Bhatija*, *Chela* or *Pota-chela* is elected.[11]

A *Mahant* has, however, no power to bargain away his office and he cannot alter the constitution of the *Math*.[12] Where a *Mahant* has a power to appoint his own successor, he cannot delegate the power to a *Mahant* of a neighbouring *math* or to any other person.[13] A person who is disqualified cannot be appointed; if appointed, his appointment would stand invalid. The appointment must be made bona fide; not in the interest of the appointer but in furtherance of the interest of the math. If it is not made bona fide it is invalid.[14]

J. REMOVAL OF SHEBAITS AND MAHANTS

In this connection Section 92 of the Code of Civil Procedure may be seen.[15] The section contemplates the following reliefs:

(*i*) removing the *shebait* or the Mahants;

(*ii*) appointment of new trustees, etc.;

(*iii*) directing accounts and inquiries;

(*iv*) setting a scheme; or

(*v*) granting any other suitable relief.

The word "trust" in Section 92 includes a Hindu religious endowment for a public or a charitable purpose.

---

8. *Radhaballav Math Endowment* v. *Fakir Pradhan*, AIR 1965 Ori 221.
9. *Mahant Sital Das* v. *Sant Ram*, AIR 1954 SC 606; *Krishna Singh* v. *Mathura Ahir*, AIR 1973 All 273.
10. *Ibid.*
11. *Mahant Sital Das* v. *Sant Ram*, AIR 1954 SC 606; *Krishna Singh* v. *Mathura Ahir*, AIR 1973 All 273; *Rambhusan Das* v. *Anand Das*, AIR 1946 PC 140.
12. *Mahant Manadeo* v. *Mahant Yaduvanish Deo*, AIR 1969 All 571.
13. *Mahant Ramji* v. *Lachhu*, (1902) 7 CWN 145.
14. *Ramlingam* v. *Vythilingam*, 16 Mad 490.
15. *See also* S. 93, CPC; Religious Endowments Act, 1863 and Religious Trusts Act, 1920.

The above reliefs can be claimed by a civil suit by any person interested[16], even in the case of a private trust.

K. ALIENATION OF DEBUTTER PROPERTY

As said before, property absolutely dedicated to religious or charitable purposes is called debutter property.

When it is dedicated to a temple it vests in the idol; when dedicated to a *Math* it vests in the *Mahant*. Legally, and in an ideal sense, the property vests in the juridical person of an idol, but its possession and management is or has to be entrusted to some person who is called a shebait or manager of the temple.[17]

(See "*Shebait*" and "*Mahant*".)

The shebait of a temple or the *Mahant* of a *Math* has large powers of disposal over the surplus income of the temple or the *Math*. The only restriction that exists in this regard is that he cannot spend anything out of it for his personal use unconnected with the dignity of his office.[18] His power of alienation of the corpus of the debutter property is to be measured by the exigencies of the occasion.

His powers to alienate debutter property is analogous to that of the manager of an infant heir as defined by the Privy Council in *Hanooman Persad case*.[19] And it has been held in that case that the shebait has no power to alienate debutter property except (*a*) "in case of need", or (*b*) "for the benefit of the estate". In this regard the actual pressure on the estate, the danger to be averted or the benefit to be conferred on it in the particular instance are the factors which are to be considered. The need may arise in order to carry on and pay for the services of the *Math* or temple or to defray the expenses of worship in the temple or for the repair or completion of the temple.

The expression "benefit of the estate" includes the preservation of the estate from extinction, its defence against hostile litigation, its protection from inundation and similar circumstances.[20]

Spending money for one's own pleasure does not constitute legal necessity. Similarly he cannot sell the property and invest the money thereof to fetch more income. He cannot grant a permanent lease of the property. If he does so, it is invalid except where it is made for legal necessity or for the benefit of the estate. One has to note that a permanent lease without legal necessity would not enure beyond the life of the *shebait* or *Mahant*.[21] In short one may say that the power of alienation has to be exercised for the purpose of defence of the property and

---

16. *Ramchand* v. *Thakur Janki Ballabhji*, (1969) 2 SCC 313: AIR 1970 SC 532.
17. *Prosonna Kumari* v. *Gulab Chand*, 2 IA 145.
18. *Commr., Hindu Religious Endowments* v. *Shri L.T. Swamiar*, AIR 1954 SC 282: 1954 SCR 1005.
19. *Hanooman Persad* v. *Musammat Babooee*, (1856) 6 MIA 393; *Bivam Prakash* v. *Narendra Das*, AIR 1966 SC 1011.
20. *Palaniappa* v. *Devasikamony*, AIR 1917 PC 33: 44 IA 147.
21. Ibid.; *Vidyavaruthi* v. *Balusami*, AIR 1922 PC 123: 48 IA 302: 44 Mad 831.

not for satisfying one's whims or for expanding one's power. Thus it boils down that these powers are to be used as a shield and not as a sword.[22]

In *Bivam Prakash* v. *Narendra Das*,[23] the Supreme Court of India, relying upon the principle laid down in *Niladri Sahu* v. *Mahant Chaturbhuj Das*[24] by the Privy Council, upheld a mortgage created by a *Mahant* (followed by a subsequent sale), when the *Mahant* borrowed money to meet legal expenses and litigation against a trespasser claiming an adverse title to the *Math*.

An improper alienation of property can be challenged by the worshippers. It is their right.[25]

Burden of proof

In case of alienation of debutter property the burden lies on the alienee to prove that there was a legal necessity in fact and that he made bona fide and proper inquiries and did all that was necessary and reasonable to satisfy himself as to its existence.[26]

L. RIGHTS OF THE FOUNDER

Every donor contributing at the time of founding a trust does not become a founder of the trust. Whether a person contributing to a trust would become in law a joint founder of the trust would depend upon the fact of his contribution, surrounding circumstances and the subsequent conduct of parties.[27]

The founder of a religious or charitable trust cannot resume the property once he has endowed the same for the purpose. However, he possesses the following rights:

(1) The founder can determine the line of succession of shebaitship. But this should not interfere with the general law of inheritance by creation of an estate unknown or repugnant to Hindu law.[28] At this juncture one has to remember that shebaitship is a kind of property and merely an office and consequently the rules of succession laid down in *Tagore* v. *Tagore*[29] apply to it. The founder can provide for succession to it by deed or will, so long as he does not attempt to create an estate unknown to Hindu law.

(2) On failure of the founder to provide for a line of succession, the shebaitship will vest in him and his heirs.

---

22. *Nagendra Nath Palit* v. *Rabindra Nath Deb*, 53 Cal 132.
23. AIR 1966 SC 1011.
24. AIR 1926 PC 112: 53 IA 253: 6 Pat 139 (PC).
25. *Puran Singh* v. *Ajaib Singh*, AIR 1991 P&H 247; *Hari Singh* v. *Bishanlal*, AIR 1992 P&H 11.
26. *Mukaremdas Mannudas* v. *Chhagan Kisan Bhadsaar*, AIR 1959 Bom 491: ILR 1957 Bom 809. See also *Hanuman Parsad* v. *Musammat Babooee*, (1856) 6 MIA 393; *Bivam Prakash* v. *Narendra Das*, AIR 1966 SC 1011.
27. *Thenappa Chettiar* v. *Karuppan Chettiar*, AIR 1968 SC 915: (1968) 2 SCR 897.
28. *Prasaddas Pal* v. *Jagannath Pal*, 60 Cal 538.
29. 5 MIA 123: (1872) 9 Beng LR 377.

(3) On failure of the line provided by the founder, the shebaitship reverts to him and his heirs.

In *Bhabatarini Debi* v. *Ashalata Debi*[30] the facts were as follows: *S*, in his lifetime, established a family idol and dedicated properties to it. He had a son *P* and a daughter *B*. As per the provisions for devolution of the *shebaiti*, *S* and his wife *R* were the first shebaits. On the death of *S* (*R* died earlier) *P* should be the shebait in his place. *S* died in 1929 and *P* died in 1932. The position that arose was that on *P*'s death in 1932, specific provisions validly made by *S* the founder, with regard to devolution of the office of *shebaiti* became exhausted.

In 1933, the founder's daughter *B*, by a suit, claimed that she had become the *shebaiti* and should have the management of the debutter property. She impleaded *P*'s widow and her daughters as persons in wrongful possession of the property. The court dismissed *B*'s suit and held that on *P*'s death, *P*'s widow became entitled to the office of *shebaiti*.

(4) In case the object of the endowment is not carried out, the founder and his heirs may sue to have the property applied to its lawful purpose. If the trust fails for want of an object, the property, as required in the suit can be applied *cy pres*, i.e. to other objects of a similar character.

M. DOCTRINE OF CY PRES: WHEN APPLICABLE

The principle upon which the doctrine stands is founded on giving effect to the intention of the testator as far as possible. Literally the expression means "approximation" or "as much near to the main purpose as possible".

In India the doctrine applies to wills and not to deeds or settlements or transfer *inter vivos*. On failure of the original purpose the courts act on the principle that the property endowed should be applied to another object which the testator had in view or an object which is nearer to the original object. As observed by the High Court of Chennai in *Karuppannan case*[31] two assumptions underline this rule. First, the testator was not in a position to carry out his object to give the property to charity by dedicating it over again. The second principle is that the law always tries as far as possible not to defeat a bequest to charity. Neither principle can apply to a gift made to charity, made by a deed *inter vivos* except where a general charitable intention is disclosed.[32]

N. LIMITATION

When a previous *shebait* or Mahant has transferred movable or immovable property for a valuable consideration but without legal necessity or benefit to the estate, his successor can file a suit to recover it within 12 years from the date of the death, resignation or removal of the transferor or the date of appointment

30. (1942-43) 70 IA 57.
31. *Karuppannan Ambalam* v. *Tirumalai Ambalam*, AIR 1962 Mad 500.
32. *Ibid.*, See also Patanjali Shastri, J. in *Veluswami Goundan* v. *Dandapani*, AIR 1946 Mad 485: (1946) 1 MLJ 354: 227 IC 103.

of the plaintiff as the manager of the endowment, whichever is later.[33] Any other person (a third party) can file such a suit in case of movable property within 3 years[34] and in case of immovable property within 12 years[35] from the date when he comes to know of such transfer.

A suit for possession of any hereditary office must be filed within 12 years from the date when the defendant takes possession of the office adversely to the plaintiff.[36]

Intermeddlers cannot sue as of right.

A person in *de facto* possession and management of the *Math* property can institute a suit for protecting the interest of the public trust.

So that a *de facto* manager can file a suit on behalf of the deity, it is necessary to prove that the *de jure* manager or trustee is not in existence and the possession and management of the *de facto* manager is exclusive.[37]

In case of disqualification of the *de jure* manager, an interested person can, with the court's permission, file a suit, impleading the *de jure* manager too, so that the decree would bind not only the deity but also the *de jure* manager.[38]

Where a *de facto* shebait is absent a person having a beneficial interest (e.g. worshipper) may be permitted to come in.

---

33. *See* Art. 96, Limitation Act, 1963.
34. Art. 95, Limitation Act, 1963.
35. Art. 94, *ibid.*
36. Art. 107, *ibid.*
37. *Somnath Davi* v. *Gopal Mohaporvu*, ILR 1961 Cut 45: AIR 1961 Ori 105.
38. *Ibid.*

Chapter XI

Stridhana

SYNOPSIS

A. Meaning
B. Classification
C. *Smriti* writers and commentators on *Stridhana*
D. Test of *Stridhana*
E. *Stridhana* includes
F. Definition by *Yajnavalkya*
Expansion by *Vijnaneshwar*
G. Privy Council and *Mitakshara* on *Stridhana*
H. Salient features of *Stridhana*
I. Sources of *Stridhana*
J. Rights of a woman over *Stridhana*
Jurisdiction to try the case
K. Succession to *Stridhana*
1. Distinctive features
2. Unmarried woman
3. Married woman: *Mitakshara*
4. Dancing girls: Succession to their property

(The Hindu Succession Act, 1956 introduced a sweeping change, which, subject to certain qualifications, now confers full and heritable capacity on a woman in regard to all property acquired by her whether it may be before 1956 or after. Consequently the woman now holds the property in her possession as a full owner and not simply as a limited owner. The law stated here is therefore of academic interest being the law prior to 1956.)

A. MEANING

The word *Stridhana* is composed of two words: "stri" (woman) and "dhana" property. The word means property belonging to a woman or a woman's property. This is the etymological sense but the word has a technical meaning given in law. As observed in *Rajamma case*[1] a gift or gifts given to a Hindu woman before and after her marriage constitute that woman's property.

B. CLASSIFICATION

Before the passing of the Hindu Succession Act in 1956, property owned by a woman could be classified into two categories:

(*a*) property of which she was an absolute owner (stridhana), and

(*b*) property of which she was a limited owner, (i.e. the woman's estate).[2]

C. SMRITI WRITERS AND COMMENTATORS ON STRIDHANA

Smriti writers and several other well-known commentators on smritis have described and enumerated different kinds of stridhana to which judicial decisions have added their own.

We would briefly summarise the same as under:

---

1. *Janaki Ammal Rajamma* v. *Varidarajula Chetti*, AIR 1957 Mad 198.
2. The term Woman's estate was coined by the British judicial administration in India.

It must be noted that the above two species of a woman's property differ in their origin, enjoyment and ultimate devolution:

(*a*) A woman's estate consists generally of property obtained from inheritance or property obtained on partition, whereas *stridhana* can be acquired in various ways.

(*b*) In the enjoyment of the former, a woman could not alienate the corpus of the property unless there was necessity, while in case of the latter the woman was the absolute owner of *stridhana* and had the full freedom to dispose it of at her pleasure with some restrictions thereon during the period of coverture.

(*c*) Upon a subsequent birth of a son or on subsequent adoption or upon her remarriage, a widow's estate was liable to be divested. This is not so with *stridhana* in any case.

(*d*) The former devolves on the next heir of the last male owner who is called a reversioner. It does not devolve on the woman's own heirs. In case of the latter, on the death of a woman, *stridhana* however goes to her own heirs.

D. TEST OF STRIDHANA

Whether a particular kind of property could be termed as *stridhana* would depend upon the following factors:

(*a*) the status of the woman at the time of acquisition of the property; i.e. whether she was unmarried, married or a widow;

(*b*) the source wherefrom the property was acquired; and

(*c*) the school of Hindu law to which the woman belonged.

E. STRIDHANA INCLUDES

The Smriti writers did not define the word *stridhana*. They did not use the word in its etymological sense but they described what was meant by it and enumerated the kinds of properties which would constitute the *stridhana*. According to Manu the following six kinds of properties were included in it:

(1) gifts made before the nuptial fire,— *Adhyagni*;

(2) gifts made at the bridal procession — *Adhyavahanika*;

(3) gifts made on account of affection by the father-in-law and the mother-in-law — *Pritidatta*. This includes gifts made at the time making obeisance at the feet of elders just after marriage,— *Pada Vandanika*;

(4) gifts made by the father;

(5) gifts made by the mother; and

(6) gifts made by the brother;

To this, the following categories have been added by later smriti writers:

(7) gifts made to a wife on supersession, i.e. at the time of taking another wife,— *Adhivedanika*;

(8) gifts made subsequent to the marriage by husband's relations and paternal relations — *Anwadheyaka*;

(9) Fee for which a girl is given in marriage called gratuity or marriage fee,— *Shulka*;

(10) Gifts from sons and relations;

According to *Devala*:

(11) Food and vesture;

according to other *smriti* writers

(12) Ornaments given by the husband are *Stridhana*.

F. DEFINITION BY YAJNAVALKYA

Yajnavalkya defines or describes stridhana in the following words:

> "What was given to a woman by the father, the mother, the husband, or a brother, or received by her before the nuptial fire, or presented to her on supersession, and the rest (*adya*) is denominated stridhana. So what is given by kindred, as well as her marriage fee (*Shulka*) and anything bestowed after marriage."

These various kinds of properties enumerated above constitute what one may term as "technical" or *paribhashika stridhana*. This is different from the meaning of *stridhana* in its literal or etymological sense.

Expansion by Vijnaneshwar

Acquisitions of a woman by her labour and skill are excluded from stridhana by Katyayana. Vijnaneshwar, the author of *Mitakshara* adopts Yajnavalkya's definition and expands it by using the word *adya* (that is, the rest), which consequently include property obtained by a woman by—

(*a*) inheritance,

(*b*) purchase,

(*c*) partition,

(*d*) seizure, i.e., adverse possession, and

(*e*) finding.

By his broad definition Vijnaneshwar produced a beneficial change in the archaic smriti law and placed women almost on a footing of equality with men as regards the capacity to hold property.

G. PRIVY COUNCIL AND MITAKSHARA ON STRIDHANA

It must however be noted that in this connection the Privy Council in *Debi Mangal Prasad case*[3] observed that property inherited by a woman, whether

---

3. *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh*, (1911-12) 39 IA 121.

from a male or a female, is not her stridhana. This is the rule that is well settled in the Benares, Bengal and Chennai schools but the Mumbai school holds the view that such inherited property is not stridhana, only if it is inherited from a male by a widow, mother or other female entering into the gotra of the propositus by marriage. Similarly property acquired by her on partition is not her stridhana property.[4] In *Bhagwandeen* v. *Myna Baee*[5] the court held that the property inherited by a widow from her husband was not *stridhana* property. In another case it was held that property inherited from a female, e.g. by a daughter from her mother, was not *stridhana* property.[6] As to the share obtained by a widow on partition it was held in *Debi Mangal Prasad case*[7] that it was not stridhana property. This is the law of the Benares school and it governs all the *Mitakshara* schools. But in Mumbai it is firmly established that property inherited by a woman is her *stridhana*, except where it is inherited from a male into whose family she has entered by marriage.

As held in *Sham Koer* v. *Dah Koer*[8] property held by a woman by adverse possession and unrealised rents and profits[9] accruing from the property given or bequeathed to a female during her widowhood, and property purchased from *stridhana*[10] is also *stridhana*.

H. SALIENT FEATURES OF STRIDHANA

The outstanding and important features of *stridhana* are two: (1) Succession and (2) power of alienation.

Insofar as the first feature is concerned a woman forms a fresh stock of descent and on her death her stridhana property devolves on her own heirs. This is not so in the case of a widow's estate. However, the Hindu Succession Act, 1956 has abolished this distinction.

As to power of alienation the woman is the absolute owner of *stridhana* and she may dispose it of at her pleasure in all cases during widowhood if not in all cases during her coverture.

I. SOURCES OF STRIDHANA

A woman may acquire property from diverse sources. The following may be presented as the principal sources thereof:

(1) Inheritance, (2) partition, (3) gifts, (4) bequests, (5) adverse possession, (6) property given in lieu of maintenance, (7) property acquired by compromise, (8) by mechanical arts, (9) obtained with the help of *stridhana* or income derived from stridhana, (10) gifts and bequest from strangers during

---

4. *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh*, (1911-12) 39 IA 121.
5. 11 MIA 487.
6. *Sheo Shankar Lal* v. *Debi Sahai*, (1902-03) 30 IA 202.
7. *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh*, (1911-12) 39 IA 121.
8. (1901-02) 29 IA 132.
9. *Mohini Mohan Basu* v. *Rash Bihari Ghosh*, 2 Cal 97.
10. *Venkata* v. *Venkata*, 2 Mad 333 (PC).

maidenhood, and (11) property acquired by sources other than those mentioned above. In *Badri Pershad* v. *Kanso Devi*,[11] the Supreme Court explained the word 'acquired'. Accordingly the word is to be given the widest meaning, because as per language of Section 14(1) it means acquisition by inheritance or by gift or by female's own skill or exertion or by purchase or prescription or in any manner whatsoever.

Whether property acquired by a woman from other sources is stridhana or not will be determined by the status of the woman and the school to which she belongs. The source of acquisition and the time of acquisition are also the factors to be taken into consideration for deciding the above question. The time of acquisition refers to the period of maidenhood, period of coverture or period of widowhood. The *Dayabhaga* and *Mithila* schools believe that gifts and bequests from strangers obtained during coverture are not stridhana. Similarly if the woman inherits property from a male into whose family she has entered by marriage such property is not *stridhana*.[12] If the woman survives her husband, gifts or bequests from strangers during coverture becomes her *stridhana* after her husband's death.

According to the *Dayabhaga* or Bengal school, that alone is *stridhana* which is in a woman's power of disposal without her husband's consent and these are gifts from relations.

During a woman's maidenhood she can dispose of her *stridhana* as she pleases. In case she is a minor, this can be done with the help of her guardian. During coverture (during married life) she can dispose of gifts from relatives, as she likes,[13] but as to gifts from strangers and property earned by her own labour, her husband's consent is required.[14] It must be remembered, however, that the husband has no ownership over such property. However, in times of extreme distress he could have recourse to it. This principle does not apply where spouses were not living together and the husband had no control over the wife.[15] Lastly, during widowhood, she has complete freedom to dispose of her stridhana, irrespective of the fact whether it was acquired before her husband's death or after. She enjoys the same freedom regarding movable property too.[16] Of course this power of disposal is *inter vivos* and not testamentary.[17] Property inherited by a woman from her parents can be disposed of by the woman without her husband's consent.[18]

---

11. (1969) 2 SCC 586, 589: AIR 1970 SC 1963.
12. *Venkareddi* v. *Hanumantgouda*, 34 Bom LR 1144.
13. *Salemma* v. *Lutchman*, ILR (1898) 21 Mad 1003.
14. *Shantabai* v. *Ramachandra*, AIR 1960 Bom 408: ILR (1959) Bom 1120.
15. *Gangadhara* v. *Chandrabhagabai*, 17 Bom 690.
16. *Chamanlal Chakubhai* v. *Bai Parvati*, 36 Bom LR 152.
17. *Gangadhara* v. *Chandrabhagabai*, 17 Bom 690.
18. *Gajanan* v. *Yashwant*, (1950) 52 Bom LR 238; *Dhondappa Narayanappa* v. *Kasabai*, AIR 1949 Nag 206.

J. RIGHTS OF A WOMAN OVER STRIDHANA

In general a woman is in absolute ownership and full power and control of disposition either by transfer *inter vivos* or by will over her *stridhana*. She has therefore the following rights in regard to it:

(*i*) Possession and enjoyment[19]— she has absolute and exclusive right of possession and enjoyment of it; and

(*ii*) her power of disposal of stridhana is absolute; besides

(*iii*) on the death of the woman the stridhana property devolves on her own heirs. This is provided by the Hindu Succession Act, 1956, Sections 15 and 16.

Statutorily it now becomes her absolute ownership property unrestrained by any conditions whatsoever. The old law of succession in this regard is totally abrogated by the above Act, removing all the traditional limitations on her power of disposal. (*See* Sections 14, 15, 16 of the Hindu Succession Act, 1956.)

Jurisdiction to try the case

In *Rajesh Kumar* v. *State of Rajasthan*,[20] the question of jurisdiction to try the case came before the court for consideration. In this case the husband was demanding dowry and torturing his wife for not fulfilling the said demand. The demand was made also at place 'D'. The wife left her matrimonial home and began to reside at place 'A'. Her *stridhana* was not returned. The alleged acts of cruelty (under Section 498-A IPC) and criminal breach of trust under Section 406 (IPC) of not returning *stridhana* were committed at place 'D'. It was decided that the courts at place 'D' only have the jurisdiction to try the case.

K. SUCCESSION TO STRIDHANA

This topic can well be divided into three parts:

(1) Rules as to succession to stridhana to an unmarried woman,

(2) Rules in regard to succession of stridhana of a married woman:

(*a*) according to *Mitakshara* law, and

(*b*) according to *Dayabhaga* law,

(3) Succession to property of dancing girls.

1. Distinctive features

Succession to stridhana property, as observed, had some distinctive features[21], one should note:

(1) Neither charity nor illegitimacy was a bar to heritable capacity; (2) propinquity was the only ground of preference; (3) female issue was ordinarily preferred to male issue; (4) stridhana heirs in the second generation

---

19. *B.T. Govindappa* v. *B. Narasimhaiah*, (1991) 4 SCC 106: AIR 1991 SC 1969.
20. 2006 Cri LJ 2062.
21. S. Venkatraman: *A Treatise on Hindu Law*, (1972), Chap. XIII, p. 291.

from the deceased took *per stirpes*; (5) stridhana heirs took as tenants-in-common; (6) illegitimacy though not a bar to inheritance, would be a ground for exclusion by a legitimate heir as, for instance, where a legitimate son excluded an illegitimate daughter; (7) what had passed as stridhana once did not so pass again, except in Mumbai, in some cases.

2. Unmarried woman

As to number (1) above Baudhayana said that on the death of an unmarried woman her property will go to the uterine brother. In the absence of such a brother it shall go to her mother and if she is dead, to her father. Virmitrodaya goes further and improves upon this statement, saying that on failure of her mother and father, the property would go to the nearest relations; i.e. her father's *Sapindas* if any and if they do not exist it goes to the mother's *Sapindas*.[22] All the schools agree to these rules.

3. Married woman: Mitakshara

For the purpose of succession to the property of a married woman, according to the *Mitakshara* school the *Stridhana* property is divided into two groups: (1) *Shulka* property and (2) property other than *Shulka*.

Shulka means fee. It is a gratuity or marriage fee for which a girl is given in marriage.

(*a*) Succession to *Shulka* according to *Mitakshara* law goes in the following order:

(*i*) uterine brothers;

(*ii*) Mother;

(*iii*) Father;

(*iv*) Father's heirs, i.e. his *Sapindas*;

(*v*) *Samanodakas* and *bandhus*.

(*b*) Succession to *Shulka* according to *Dayabhaga* law goes in the following order:

(*i*) Whole brother;

(*ii*) Mother;

(*iii*) Father;

(*iv*) Husband.

(*c*) Succession to other kinds of *stridhana* according to *Mitakshara* law goes in the following order:

(*i*) Unmarried daughter;

(*ii*) Married daughter, unprovided for;

(*iii*) Married daughter, provided for;

---

22. *Annagouda Nathgouda Patil* v. *Court of Wards*, 1952 SCR 208; *Janglubai* v. *Jetha*, 32 Bom 409.

(*iv*) Daughter's daughter;

(*v*) Daughter's son;

(*vi*) Son;

(*vii*) Son's son.

(*d*) In the absence of the abovesaid heirs the *stridhana* passes, if she was married in an "approved form", in the following order[23]:

(*i*) Husband;

(*ii*) Husband's heirs in order of succession;

(*iii*) Her blood relations.

(*e*) If she was married in an "unapproved form", the *stridhana* passes in the following order:

(*i*) Mother;

(*ii*) Father;

(*iii*) Father's heirs;

(*iv*) Husband's heirs.

(*f*) Succession to *stridhana* according to *Mayukha*:

Mayukha is of paramount authority in the island of Mumbai, Gujarat and Northern Konkan. It divides *stridhana* into two divisions for the purposes of succession: (*i*) Technical *stridhana* and (*ii*) non-technical stridhana. The former is composed of gifts and bequests from relations made at any time; while the latter consists of property inherited by a woman as full owner, her earnings, gifts or bequests from strangers. Succession according to *Mayukha* is governed by special rules given therein.

(*g*) Succession to *stridhana* according to *Dayabhaga* law:

This branch of Hindu law divides *stridhana* into four divisions: (*i*) *Shulka* is a gift to induce the bride to go to her husband's house; (*ii*) *Yautaka* means gifts made at the time of marriage; (*iii*) Gifts and Bequests from father after marriage, called *Anwadheyaka*; (*iv*) *Ayautaka*: gifts and bequests from relations made before the marriage or after marriage (called *Ayautaka*), except gifts and bequests from father after marriage and falling under class (*iii*) above.

(*i*) *Shulka* passes in the following order:

See 3(*b*) above.

(*ii*) *Yautaka* passes in the following order:

(1) Unbetrothed daughters, (2) betrothed daughters, (3) married daughters having sons, (4) barren married daughters and childless widowed daughters (in equal shares), (5) sons, (6) daughter's

---

23. *Polamarasetti Atchanna* v. *Dodi Appanna*, (1966) 1 Andh WR 362; see also *Sham Lal* v. *Amar Nath*, (1970) 1 SCC 33.

sons, (7) son's sons, (8) son's son's sons, (9) stepsons, (10) stepson's sons and (11) stepson's son's sons.

(*iii*) *Anwadheyaka* passes in the following order: It passes in the same order as ayautaka but with a difference that sons take before married daughters. If the woman dies issueless it passes in the following order: (1) brother (2) mother, (3) father, and (4) husband.

(*iv*) *Ayautaka*: Its succession is in the following order:

(1) sons and maiden daughters (in equal shares); (2) married daughter's having sons; (3) son's sons, (4) daughter's sons, and (5) barren married daughters and childless widowed daughters.

4. Dancing girls: Succession to their property

Dancing girls are known as *Naikins*. Succession to their property was regulated by the custom of their community. Accordingly daughters inherited in preference to sons and their heir took an absolute estate.[24] In case where there was no custom, according to the Supreme Court of India[25], succession was governed according to the rule of propinquity as a rule of justice, equity and good conscience. The Supreme Court observed that a married daughter, because she preferred family life and did not pursue prostitution, cannot be superseded by a daughter who followed the traditional occupation of the community.[26] Prostitution does not disconnect or sunder the blood relationship of such girls with the relatives by blood or marriage. On her death her property devolves as stridhana[27] on her heirs in the following order:

(1) Legitimate and illegitimate daughters;

(2) Legitimate and illegitimate sons;

(3) Brother;

(4) Sister;

(5) Sister's son;

(6) Husband; and

(7) Stepson.

Legitimate sons of a *Naikin* before she took to prostitution would exclude a daughter born to her in prostitution.[28] Naikin's sons by different fathers could succeed to each other.[29]

---

24. *Viswanatha* v. *Duraiswami*, AIR 1926 Mad 289: ILR (1925) 48 Mad 944.
25. *Saraswathi* v. *Jagadambal*, AIR 1953 SC 201: 1953 SCR 939.
26. *Ibid.*
27. *Subbaraya* v. *Ramaswami*, ILR (1900) 23 Mad 171.
28. *Meenakshi* v. *Muniandi*, AIR 1915 Mad 63: ILR (1915) 38 Mad 1144.
29. *Viswanatha* v. *Duraiswami*, AIR 1926 Mad 289: ILR (1925) 48 Mad 944.

Chapter XII

Woman's Estate

SYNOPSIS

Two Categories

A. Position before the passing of the Hindu Succession Act, 1956
   1. Nature of a woman's estate
   2. Incidents of a woman's estate
      (*a*) Absolute possession
      (*b*) Beneficial enjoyment
      (*c*) No alienation except for legal necessity
      (*d*) Can sue and be sued
      (*e*) Transfer of life interest
      (*f*) Devolution on death
      (*g*) Management
      (*h*) Life interest liable to be sold, etc.
      (*i*) Estate when divested
      (*j*) Dispossession
      (*k*) Restrictions inseparable from estate
      (*l*) Self-effacement and acceleration

B. Change brought about by the Hindu Succession Act, 1956.

This chapter is of historical importance only as since the passing of the Hindu Succession Act, 1956, by Section 14 the Hindu woman's limited estate was abolished and she has been made an absolute owner thereof.

TWO CATEGORIES

The property by a Hindu woman was classified in Hindu law into two categories:

(*a*) Property over which the woman had an absolute right of disposition, and

(*b*) Property over which the woman had but limited power of disposition.

The former is called *Stridhana property* while the latter is known as *woman's property*, or *woman's estate* or *widow's estate*.

This topic may be divided in two parts: (1) Position before the passing of the Hindu Succession Act, 1956 and (2) The change brought about by the said Act.

A. POSITION BEFORE THE PASSING OF THE HINDU SUCCESSION ACT, 1956

1. Nature of a woman's estate

Nature of a widow's estate has been aptly described in *Janki Ammal case*[1] by the Privy Council. The decision observes that though a widow takes as heir only a specified and qualified estate, she is a mere life tenant of the property, as being merely entitled to the enjoyment of the property without any power of disposal over it. A widow or other limited heir is the owner of the property inherited by her, subject to certain restrictions on alienations, and subject to its divestiture on adoption or devolution upon the next heir of the last full owner

1. *Janaki Ammal Rajamma* v. *Varidarajula Chetti*, AIR 1957 Mad 198.

upon her death. Her right is the nature of a right of property, her position is that of the owner; her powers in that character are, however limited; but so long as she is alive no one has any vested interest in the succession. However, if the widow is found to waste the property the other parties will have their remedy.[2] As decided by the Supreme Court[3] a widow is entitled to full beneficial enjoyment of the estate. So long as she is not guilty of wrongful waste, she is answerable to none. Her estate is a life estate and she cannot grant a permanent lease of the disputed land except in case of legal necessity and with the consent of the reversioners. If this is not so, it is not binding on the reversioners.[4] Full ownership has been described by the Supreme Court as a sum total of all the rights which may possibly flow from the title property while limited ownership is a bundle of rights constituting in their totality not full ownership but something less. When a widow holds property for her enjoyment as long as she lives nobody is entitled to deprive her of it or to deal with the property in any manner to her detriment. The property is for the time being beneficially vested in her and she has the occupation and the usufruct of it to the exclusion of all others. Such relationship with the property falls squarely within the meaning of the expression "limited owner".

2. Incidents of a woman's estate[5]

(*a*) **Absolute possession.**—A woman holding the widow's estate is entitled to its absolute possession. If she is dispossessed of any portion thereof she can sue to recover it.

(*b*) **Beneficial enjoyment.**—She has the beneficial enjoyment of the estate and she can enjoy the whole income of the property and spend it in any way she pleases. She need not pay the charges levied on the estate from her income. In the same way the burden of paying her husband's debts, or the maintenance or marriage expenses of the members of her husband's family may properly be levied or imposed on the corpus of the estate. For this purpose the estate might be mortgaged or sold.[6]

(*c*) **No alienation except for legal necessity.**—She has no right to sell, mortgage, gift, lease or alienate the estate except in case of a legal necessity or for the benefit of the estate. If the next reversioners agree she may do it. In such a case she could pass an absolute estate to the alienee to the same extent as an alienation made by a full owner. A presumptive reversioner cannot be allowed to challenge such an alienation in case of his taking benefit under election.[7]

(*d*) **Can sue and be sued.**—Barring the abovesaid limitations she was the absolute owner representing the estate and consequently she could sue others

---

2. *Rama Chandra Velayudh* v. *Seemiathal*, AIR 1954 Mad 1011: 35 Mad 728.
3. *Gogula* v. *Kurumeti*, (1975) 4 SCC 458; *Surendra Nath* v. *Ishwar Majhi*, AIR 1974 Cal 216.
4. *See* also *Bai Vajia* v. *Thakorbhai Chellabhai*, (1979) 3 SCC 300: AIR 1979 SC 993.
5. M.D. Manek: *Handbook of Hindu Law*, Chap. XIII; P.M. Chadha: *Hindu Law*, (1978), Chap. 2.
6. *Devi Dayal* v. *Bhanu Pratap*, (1904) 31 Cal 433.
7. *S.S. Pillai* v. *K.S. Pillai*, AIR 1972 SC 2069; *Jagarlapudi Seetharamayya* v. *Sarva Chandrayya*, (1954) 2 MLJ 162 (Andh) *relied on.*

and she could be sued in regard to the estate. A decree passed in this connection was not only binding on her but it was binding on the reversioners also.

(*e*) **Transfer of life interest.**—She could transfer her life interest even without necessity and such an alienation would be good during her lifetime unless she remarried or adopted a son to her deceased husband or surrendered the estate to the next reversioners.

(*f*) **Devolution on death.**—On her death the estate devolves on the next heir of the last full owner and not on her stridhana heirs. Hence if she inherited the estate from her son and not her husband, on her death the property passes to the next heirs of her son and not of her husband.[8]

(*g*) **Management.**—She has every right to manage the estate fairly and with reasonable latitude therein so as not to damage the interests of the expectant heirs. When she commits waste or threatens to commit it, she may be restrained by an injunction.

(*h*) **Life interest liable to be sold, etc.**—Her life interest in the property is liable to be seized and sold in execution of a decree against her for her personal debts.

(*i*) **Estate when divested.**—The estate is liable to be divested on her remarriage, or the subsequent birth or adoption of a son, but not on her subsequent unchastity.

(*j*) **Dispossession.**—In case of dispossession by a third person, of any portion of the property, she could sue to recover the possession. But her failure not to sue strengthened the adverse possession in the third party. However, the reversioners are not affected thereby because they succeed not as her heirs but as her husband's heirs. They, therefore, could sue for possession within 12 years from the date of her death.

(*k*) **Restrictions inseparable from estate.**—Restrictions on a Hindu widow's power to alienate are inseparable from her estate and their existence does not depend upon the existence of heirs capable of taking it on her death.[9] Consequently her alienations in excess of her powers, though not absolutely void, are only voidable at the option of those who would be entitled to the property by survivorship, inheritance or escheat.

(*l*) **Self-effacement and acceleration.**—A widow could withdraw herself from the inherited property or could renounce the interest therein, thus accelerating the succession of the next heirs of the last full owner to such property. This is known as the surrender of interest by a limited owner which has the effect of self-effacement by the limited heir. It is a voluntary act on a widow's part.

---

8. *Ram Khelawan* v. *Lakshmi Prasad Singh*, AIR 1950 Pat 194.
9. *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, (1868) 12 MIA 397.

B. CHANGE BROUGHT ABOUT BY THE HINDU SUCCESSION ACT, 1956

The change brought about by Section 14 of the Hindu Succession Act, 1956 *in the concept of stridhana and a widow's estate* is a sweeping one. Under the earlier Hindu law several types of *stridhana* or woman's property were contemplated and succession to such property was made to depend on many factors: Whether the woman was married or not, whether her marriage (if she was married) was in approved form or not. But Section 14 makes a bold departure by completely dissociating the former law of succession from its former moorings in religion. We may say it overrides the old law on the subject by providing that "any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner".[10]

The Explanation to Section 14(1) seeks to enlarge the meaning of the word "property"[11] and deals with various sources and modes of acquisition. "Property" as the Explanation says, includes both, movable as well as immovable property acquired as shown in it and in any other manner whatsoever, and includes stridhana. It covers constructive possession as well as possession-in-law.[12]

As expressed in *Eramma case*[13] by the Orissa High Court, the object of the above provisions is to confer a benefit upon a Hindu woman by enlarging her limited interest in property inherited or held by her into an absolute interest with retrospective effect. It was also to ensure to women equality of status and of opportunity with men in relation to title to, and enjoyment of, property. And this is placed beyond doubt by sub-section (2) of Section 14.[14] The same proposition is reiterated in *Gurumurthy case*[15] by the Supreme Court of India, saying that a Hindu widow is entitled to the full beneficial enjoyment of the estate. So long as she is not guilty of wilful waste, she is answerable to none. Her estate is not a life estate, because in certain circumstances she can give an absolute and complete title, nor is it in any sense an estate held in trust for reversioners. She fully represents the estate and, as long as she is alive, no one has any vested interest in the succession. She is in no sense a trustee for those who come after her. During her lifetime she represents the whole inheritance and a decision in a suit by or against the widow, as representing the estate is binding on the reversionary heirs. It is the death of the female owner that opens the inheritance to the reversioners, and the one most closely related at the time to the last full owner becomes entitled to possession. In her lifetime however the reversionary right is a mere possibility or *spes successionis*. It is therefore impossible for a reversioner to contend that any loss which the estate might have sustained due to

---

10. S. 14(1), Hindu Succession Act, 1956.
11. *Gummalapura Taggina Matada Kotturuswami* v. *Satre Veerayya*, AIR 1959 SC 577: 1959 Supp (1) SCR 968.
12. *Ibid.*
13. *Eramma* v. *Veerupana*, AIR 1966 SC 1879: (1966) 2 SCR 626.
14. *Marudakkal* v. *Arumugha Gounder*, AIR 1958 Mad 255.
15. *G. Gurumurthy* v. *K. Ayyappa*, (1975) 4 SCC 458: AIR 1974 SC 1702.

a widow's negligence should be compensated from out of the widow's separate properties. He is entitled to get only the property left on the date of the death of the widow.

Similarly in *G. Krishna Das* v. *Venkayya*[16] it was held by the Supreme Court that where a widow was placed in possession of certain joint family property in lieu of her right to maintenance before the coming into force of the Hindu Succession Act, 1956, her right to the property in question, in view of Section 14(1) of the Act, became enlarged into an absolute estate.

Section 14 which has brought about this change was challenged as violative of Article 15 of the Indian Constitution but the Supreme Court[17] held that the Section was constitutional and did not violate Article 15. If a wife acquires an absolute interest in her husband's property by operation of Section 14, her subsequent remarriage does not divest her of such property.[18]

Section 14(2) carves an exception to the application of Section 14(1) and explains that the provisions of Section 14 do not apply to any property acquired by way of gift or under a Will or any other instrument, or under a decree or order of a civil court or under an award where the terms of a gift, Will or other instrument, or the decree, order or award prescribe a restricted estate in such property.

---

16. (1978) 1 SCC 67: AIR 1978 SC 361.
17. *Pratap Singh* v. *Union of India*, (1985) 4 SCC 197: AIR 1985 SC 1695.
18. *K. Naik* v. *Bewa*, AIR 1989 Ori 10; *Harbati* v. *Jasodhra*, AIR 1977 Ori 142.

Chapter XIII

Inheritance under the Mitakshara and Dayabhaga Schools before 1956

SYNOPSIS

A. General
B. Property passing by succession
C. Foundation of the rules of inheritance
D. General principles of succession
   1. Agreement cannot override it
   2. No transfer: It being *spes successionis*
   3. Inheritance cannot remain in suspense
   4. Absolute estate and limited estate
   5. Fresh stock of descent
   6. Whole-blood preferred to half-blood
   7. Blood relation and religious efficacy
   8. The Doctrine of Representation
   9. Tenants-in-common and joint tenants
   10. Division *per stirpes* and *per capita*.

(Since this part of the discussion mainly explains the provisions regarding succession under the ancient uncodified law, it is now of academic interest only as Hindu succession is now governed by the Hindu Succession Act, 1956.)

A. GENERAL

Before the enactment of the Hindu Succession Act, 1956 different modes or systems of devolution of property of a Hindu prevailed in India. Under the *Mitakshara* system of law the property may devolve (*i*) by succession and (*ii*) survivorship.[1] Here the nature of property is the main factor which determines the mode in which it devolves. Devolution of property by survivorship applies to the individual interest of a Hindu in joint family property, while succession applies to the separate or self-acquired property of a Hindu. Thus while the *Mitakshara* system recognises two modes of devolution, the Dayabhaga system recognises only one mode of devolution, i.e. it recognises devolution of property by succession, whether the property be a share in the joint family property or the separate property of a Hindu.

Property may be (1) separate property of the last owner or (2) ancestral property, that is property inherited by a male Hindu from his father or from his father's father or from his father's father's father.

Separate property devolves by succession. And succession may be testamentary or intestate. Intestate succession is also called inheritance.

The Hindu Succession Act, 1956 applies only to succession to the separate property of a Hindu; it has no application to devolution of interest in a Mitakshara coparcenary property.

---

1. *Katamma Natchiar* v. *Rajah of Shivagunga*, (1863) 9 MIA 543.

B. PROPERTY PASSING BY SUCCESSION

The following property passes by succession:

(*a*) Property of an individual who has separated from his coparceners.

(*b*) Property which is self-acquired property of a coparcener.

(*c*) Property held by a sole surviving coparcener.

(*d*) *Stridhana* of a female member (now all property possessed by a female member).

(*e*) Property of a reunited person.

(*f*) Interest of a male Hindu in a *Mitakshara* coparcenary

— if the male leaves a female relative as specified in Class I of the Schedule to the Hindu Succession Act, 1956,

— if the male leaves any male relative as specified in that class and claiming through such female relative.

C. FOUNDATION OF THE RULES OF INHERITANCE

According to *Manusmriti*[2] "to the nearest sapinda the inheritance next belongs".[3] The *Mitakshara* system interprets "sapinda" as signifying community of blood or of particles of the same body, i.e. relationship between persons through descent from a common ancestor. On the other hand the *Dayabhaga* system interprets "*sapinda*" as community in and through the offering of funeral oblations. In short one may say that for the former system consanguinity or blood relationship formed the basis of heritability, and propinquity or proximity of such relationship determined preference; under the latter the principle of spiritual benefit decided both, heritability as well as preference.

When a Hindu dies his estate devolves in various ways. To devolve means passing from a person dying to a person living.[4] The estate passes subject to the following conditions:

(*a*) If the deceased was at the time of his death the sole surviving coparcener, his estate passes to his heirs by succession. If such a person has left any separate property that would likewise pass to his heirs by succession.

(*b*) In so far as *stridhana* is concerned, special rules apply. However, now under the Hindu Succession Act the property possessed by a woman passes by succession under the Act.

---

2. Chap. 9.
3. अनन्तरः सपिण्डाद्यस्तस्य तस्य धनं भवेत्। Verse 187: Among the *sapindas*, that one who is the nearest to the issueless deceased that the property goes.
4. *M.K. Balkrishnan Menon* v. *Asstt. Controller of Estate Duty-cum-ITO*, (1971) 2 SCC 909, 916: AIR 1971 SC 2392.

(*c*) In cases of "Impartible Estates", succession was governed by custom of the family or was governed by the terms of the grant. However, now all impartible estates (except those created by statutes) are abolished and they pass by inheritance.

(*d*) In case of "reunion" special rules apply.

(*e*) If the deceased was a coparcener in the joint family, his interest would pass by survivorship to the other coparceners. This was the position before the coming into force of the Hindu Women's Rights to Property Act, 1937. If, however, he dies after the coming into force of the aforesaid Act, his share passes to his widow and if there is no widow, it will pass to the other coparceners.

D. GENERAL PRINCIPLES OF SUCCESSION

1. Agreement cannot override it

As observed in the famous case of *Tagore* v. *Tagore*[5] the law of inheritance being part of the law of the land, cannot be overridden by agreement or provision of a document altering the same. To be precise, the order of inheritance cannot be changed by mere agreement. Similarly as observed by the Nagpur High Court[6], a right of inheritance, once it has vested, cannot be transferred or passed on by a mere agreement. A proper deed of conveyance is necessary for the purpose.

2. No transfer: It being *spes successionis*

It is evident that a right of a person to succeed is a mere chance, a bare chance called *spes successionis*. Consequently it cannot become the subject of a valid transfer. A person who enters into an agreement as regards his right of inheritance is not bound by his agreement even though he inherits on opening the succession.

3. Inheritance cannot remain in suspense

When the owner of property dies and there is no preferable heir living or no such heir is conceived at the time, the inheritance cannot remain in suspense or intermission. The rule is, therefore, that the right of succession must vest in the person who is the nearest heir at the time of the owner's death. For clarification it must be stated that at the time when the succession opened, if a person exists in the womb (*en ventre sa mere*), he is, by a fiction of law, considered to be a living person for the purpose of succession. Similarly a posthumous son is entitled to succeed to the property of his father, however this principle cannot be extended to the case of a stillborn son.[7]

---

5. 9 Beng LR 377: (1872) IA Supp 47.
6. *Sobhag Singh* v. *Pirthesingh*, AIR 1951 Nag 259.
7. *Ammireddi Sooramma* v. *Ammireddi Venkataratnam*, AIR 1952 Mad 166.

4. Absolute estate and limited estate

Males who succeed to a male or to a female take property absolutely. But females who succeed to a male or to a female could not take the property absolutely and thus they took only a limited estate[8] in the property except in certain cases in Maharashtra. A limited estate is an estate of enjoyment, it is not an estate of disposition. It must however, be noted that now under the Hindu Succession Act, 1956, both, males and females take absolutely. The discrimination is removed by the Act.

5. Fresh stock of descent

Only a full owner of property could become a fresh stock of descent. One who held the property absolutely at the time of his death was the last full owner. Except in cases of *stridhana* and in certain cases in the former State of Bombay (now Maharashtra State), a female could not become the full owner of the property inherited by her. As a consequence of this she could not be a fresh stock of descent and the property inherited by her passes, not to her heirs, but to the next heir of the male from whom she inherited the property in question. Now, due to enactment of the Hindu Succession Act, 1956, a female takes the property absolutely and therefore can now become a fresh stock of descent.

6. Whole-blood preferred to half-blood

If there are heirs of whole-blood as well as of half-blood and they are equal in degree of propinquity to the deceased the heir of half-blood ranks immediately after the heir of whole-blood. The principle is that whole-blood is always preferable to half-blood. At this juncture one must note that sons by the same mother but by different fathers (called uterine brothers) have no relationship for succession, the reason being that they belong to different families.

7. Blood relation and religious efficacy

Blood relationship or proximity in blood is known as propinquity and religious efficacy is religious efficiency or religious effectiveness.

As per the *Mitakshara* School the right to inherit arises from propinquity, that is, proximity in blood. Under the Dayabhaga School this test is religious efficacy, that is to say the capacity to confer spiritual benefit upon the manes (spirit of a dead person) of paternal and maternal ancestors. This is called "sapindaship". [*See* "The foundation of the rules of inheritance" (*supra*).] Both the schools start with the same text of Manu[9] but the difference that arises is due to interpretation of the word sapinda. In short, for the Mitakshara system

---

8. *Bhagwandeen* v. *Myna Baee*, (1866) 11 MIA 487 (acquisition by inheritance); *Mangal Prasad* v. *Mahadeo Prasad*, (1912) 39 IA 121 (acquisition on partition).
9. *Manusmriti*, Chap. 9, Verse 187.

consanguinity or blood relationship formed the basis of heritability and proximity of blood relationship determined preference. Under the Dayabhaga system the principle of spiritual benefit decided both, heritability as well as preference.

Under the *Mitakshara* system, though the right to inherit does not arise from the right to offer oblations, the test to be applied in case where a question of preference arises is, in the case of sagotra sapindas, the capacity to offer oblations. Thus as observed by the Allahabad High Court[10] when the degree of blood relationship furnishes no certain guide about the preferential right to inherit amongst two or more claimants, the test is the capacity for conferring spiritual benefit.

Sapinda relationship as understood by the *Mitakshara* system is based upon and can arise out of a lawful wedlock.

8. The Doctrine of Representation

Hindu law recognises representation in the matter of succession to a limited extent. If a Hindu dies leaving behind two sons and a grandson by a pre-deceased son, the grandson will take one-third share in the property left by his grandfather as the representative of his deceased father.[11]

In a case like this under the Mahommedan law, the grandson cannot claim anything as the representative of his deceased father; the entire property will be inherited by his uncles.[12]

But even in Hindu law, if a Hindu dies leaving behind one brother and one nephew by his pre-deceased brother, the entire property will be taken by the surviving brother; the nephew will not get anything as the representative of the pre-deceased brother.[13]

The doctrine of representation in Hindu law is applicable only to the case of sons, grandsons and great-grandsons. It does not apply among brother's sons and brother's grandsons. A nephew (brother's son) is, therefore, entitled to succeed in preference to grandnephew.[14] Thus a son, a grandson whose father is dead and a great-grandson whose father and grandfather both are dead, succeed simultaneously as one heir and form a coparcenary. The reason why they succeed simultaneously is that the grandson represents his father for a share, and the great grandson represents both his father and grandfather for a share in the heritable property of the paternal ancestor.

For example *A*, a separated Hindu, dies leaving a brother *B* and two nephews *C* and *D* by another brother. Here the right of representation is confined to the

---

10. *Kashiley* v. *Hira*, AIR 1952 All 229 (FB).
11. A.C. Sen: *A Supplement to Mozley and Whiteley's Law Dictionary*, (1971), pp. 119-120.
12. *Ibid.*
13. *Ibid.*
14. *Sher Singh* v. *Basdeo Singh*, 50 All 904.

lineal male descendants of the deceased owner. *C* and *D* are not lineal descendants of *A*. They therefore cannot represent their father, they being collaterals of *A*. Consequently *B* is entitled to the whole estate as the nearest heir of *A*.

9. Tenants-in-common and joint tenants

The general rule is that where two or more persons succeed together as heirs they take the estate as tenants-in-common and not as joint tenants. They have no right of survivorship *inter se*. However, in the following four cases they succeed as *joint tenants* with the right of survivorship:

(*i*) Two or more *sons*, *grandsons* or *great grandsons* inheriting jointly the separate property of their paternal ancestor;

(*ii*) two or more *widows* inheriting the estate of their husband;

(*iii*) two or more *daughters* inheriting the estate of their father, except in case of the former State of Bombay (now Maharashtra State), where they take absolute estate;

(*iv*) two or more *grandsons by a daughter* who are living as members of a joint family, inheriting the estate of the maternal grandfather.

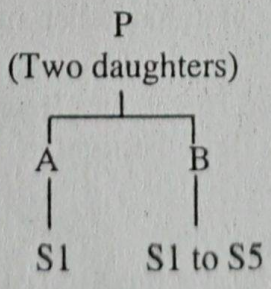
Now under Section 19(*b*) of the Hindu Succession Act, 1956 also, such heirs take property as tenants-in-common and not as joint tenants.

10. Division per stirpes and per capita

Per stirpes and *per capita* are the terms in the law of succession, fixing the shares the descendants or other beneficiaries are to take. If the share is *per capita*, all in the designated class take equally, by heads; if it is *per stirpes*, they take by branches of the family, for example grandchildren jointly taking their parent's share.[15]

Thus the general mode of division among heirs of the *same degree* of relationship is *per capita*. In *per capita* the property is divided among all the claimants entitled to it in equal shares. Daughter's sons take *per capita*. For example—

P has two daughters, *A* and *B*. Daughters predecease *P*. Daughter *A* leaves one son and daughter *B* leaves five sons. On the death of *P* the six sons will take equally:



15. D.M. Walker: *The Oxford Companion to Law*, (1980), p. 946.

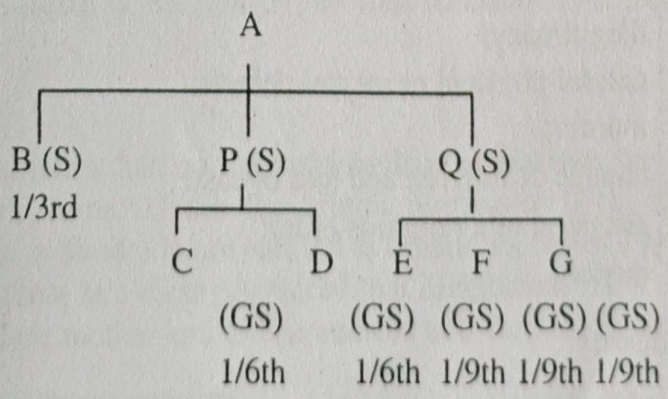
Similarly, if there are two daughters, one of them having three sons and the other having four sons, on the death of the first daughter the whole property will go to the second daughter (except in the former State of Bombay). On her death the property passes to seven sons in equal shares.

In case of more than one claimants belonging to *different degrees* of relationship to the propositions (the person concerned) the property will be divided *per stirpes*, i.e. according to branches of the family or according to the member of stock of descent. Division *per stirpes* will be only in the following two cases:

(*i*) Partition between the sons, grandsons and great-grandsons, and

(*ii*) descendants in the second degree, such as sons' sons, daughter's sons, and daughter's daughters succeeding to stridhana.

Where there are several grandsons by different sons they take *per stirpes*. For example: *A*, a Hindu male, dies leaving a son *B*, two grandsons of second son *P*, who is pre-deceased and three grandsons of a third son *Q*, who is also pre-deceased. On the death of *A* his estate will be divided into three equal parts (in three branches). Out of these three parts (1/3rd + 1/3rd + 1/3rd) *B* takes one part, (i.e. 1/3rd), *P*'s two sons take second 1/3rd part to be divided equally between them (i.e. 1/6th each) and *Q*'s three sons take the third 1/3rd part to be equally divided between them (i.e. 1/9th each). Thus among grandsons by different fathers (as in this example), the division of shares is according to the branches of the family, i.e. according to fathers (or *per stirpes*) and their sons whether they are equal in number or unequal are the heirs of their respective father. This example enables us to draw a proposition that— (1) the grandsons by different sons; (2) granddaughters by different mothers; (3) grand children succeeding to stridhana; and (4) on partition among them the sons, grandsons and great-grandsons of the deceased take *per stirpes* i.e. according to the number of stock of descent.



(**Nota bene**: In continuation of this Chapter, readers may refer to Chapter XVII in this book for codified law.)

Chapter XIV

Exclusion from Inheritance and Partition

SYNOPSIS

A. General
B. Law prior to 1956
   1. Unchastity
   2. Remarriage
   3. Illegitimacy
   4. Natural, physical or mental defects
   5. Murder
   6. Change of religion and loss of caste
   7. Adoption of a religious order
   8. Custom
C. Effect of disqualification
D. Exclusion from partition
E. Law from 1956

A. GENERAL

The ancient Hindu mind, engrossed in *Karmakanda* or sacrifices, believed that all the property was intended for that purpose only. Consequently those who were incapable of performing the rites due to mental or physical incapacities were thought incapable of possessing property. This was the reason to exclude such persons from inheritance and partition. This rule of pure Hindu law stands modified by the following enactments:

(*i*) Hindu Inheritance (Removal of Disabilities) Act, 1928.

(*ii*) Hindu Widows' Remarriage Act, 1856.

(*iii*) Hindu Succession Act, 1956.

(*iv*) Freedom of Religion Act, 1850.

B. LAW PRIOR TO 1956

Prior to the passing of the Hindu Succession Act, 1956 the grounds for exclusion from inheritance and partition were as follows:

(*i*) Unchastity of a woman;
(*ii*) remarriage;
(*iii*) illegitimacy;
(*iv*) natural physical or mental defects;
(*v*) murder;
(*vi*) change of religion and loss of caste;
(*vii*) adoption of a religious order;
(*viii*) custom.

1. Unchastity

Under Hindu law a widow was respected and therefore enjoined to keep her husband's bed "unsullied". Consequently unchastity of a widow debars her from inheritance. The position under Mitakshara law was that unchastity was a

ground of excluding only the widows. Therefore a daughter, a mother or a sister could inherit even though unchaste at the time when the inheritance opened.[1] In the case of a widow it was necessary that unchastity should have existed at the time when inheritance opened. Subsequent unchastity of a widow after she inherited the estate did not have the effect of divesting the estate vested in her when chaste.[2]

Unchastity was no ground against the widow for excluding her from inheriting the property of her husband's kinsmen as a widow of a gotraja sapinda.[3] Similarly it was no ground of exclusion regarding succession to stridhana property.[4] A husband could condone his unchaste wife's conduct and this was a condition precedent to inheriting the husband's estate.[5]

According to the Dayabhaga law chastity was a condition to succession of all the five female heirs.

The provisions of the Hindu Succession Act, 1956 now explicitly state that chastity is not a ground for exclusion from inheritance. The Act provides[6] that "No person shall be disqualified for succeeding to any property on the ground of any disease, defect or deformity, or save as provided in this Act, on any other ground whatsoever". Consequently unchastity is now not a ground disqualifying inheritance. No person now could be excluded on this ground from inheritance.

2. Remarriage

A widow when she remarried, forfeited the interest taken by her in her husband's property. Such interest passed to the next heirs as if she were dead. The position now, as it stands after the enactment of the Hindu Succession Act, 1956, is that the widow of a predeceased son, or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date the succession opens she has remarried.

Before the Act came into force a widow on remarriage did not lose her right to succeed to the estate of her son by her first husband. This rule stands valid even today.

3. Illegitimacy

Illegitimate children had no right of inheritance, however they could inherit their mother's stridhana. Under the Hindu Succession Act, 1956, even an illegitimate son of a Shudra is not entitled to inherit his father's property. Under the Act of 1956 there is a clear provision[7] that illegitimate children are deemed to be related to their mother and to one another and their legitimate descendants

---

1. *Vedammal* v. *Vedanayaya Mudaliar*, 31 Mad 100; *Advyapa* v. *Rudrava*, 4 Bom 104; *Akoba Laxman Pawar* v. *Sai Genu Laxman Pawar*, ILR 1941 Bom 438.
2. *Gangadhar* v. *Yellu*, 36 Bom 138; *Parvati* v. *Bhiku*, 4 Bom HC (ACJ) 25.
3. *Akoba Laxman Pawar* v. *Sai Genu Laxman Pawar*, 43 Bom LR 338.
4. *Advyapa* v. *Rudrava*, 4 Bom 104.
5. *Gangadhar* v. *Yellu*, 36 Bom 138.
6. Section 28.
7. Proviso to Section 3(1).

are deemed to be related to them and to one another by legitimate kinship. They can therefore succeed to one another.

However, legitimate children are not related to illegitimate children of the same father or mother and they cannot inherit to or from each other.

4. Natural, physical or mental defects

The only defects that disqualified a person from inheritance or taking a share on partition were congenital (1) lunacy or (2) idiocy.

In this regard the Hindu Inheritance (Removal of Disabilities) Act, 1928[8] provided that:

> "Notwithstanding any rule of Hindu law or custom to the contrary, no person governed by the Hindu law, other than a person who is and has been from birth a lunatic or idiot, shall be excluded from inheritance, or from any right or share in joint family property by reason only of any disease, deformity or physical or mental defect."

The 1928 Act applies to all Hindus, except those governed by the Dayabhaga system of law. Prior to 1928 there were many defects which excluded a person from inheritance, for example, blindness, deafness, dumbness if they were both congenital and incurable. Similar was the case with leprosy, loss of limb or organ and other incurable disease. Under the 1928 Act only two defects disqualify from inheritance; they are — congenital lunacy and congenital idiocy.

Finally, the Hindu Succession Act, 1956 under Section 28 makes the position clear and now "any disease, defect or deformity or . . . any other ground whatsoever" no longer disqualifies a person from inheritance and therefore congenital lunacy or congenital idiocy are also no grounds for disqualification.

5. Murder

Under pure Hindu law there is no foundation for this disqualification. However it is in the fitness of things that according to the principles of justice, equity and good conscience, *a murderer should not be allowed to take advantage of his own crime.* This disqualification applies not only to the murderer but also to persons claiming a title through him, such as his natural or adopted sons.[9] Similarly persons who have been privy to the murder cannot claim heirship to a murdered person. The murderer is thus treated as non-existent and not as one who forms a fresh stock of descent. The disability arising is not an absolute disability; it is a qualified one.

Now, the 1956 Act under Section 25 provides as under:

> "A person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or

---

8. Section 2.
9. *Adiveppa Babu* v. *Veerbhadrappa Baswantappa*, AIR 1948 Bom 11.

any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder."[10]

The word "murder" is not defined in the HSA. IPC has defined it. But the Bombay High Court held in *Minoti* v. *Sushil Mohan Singh Malik*[11], that the two Acts are not in *pari materia*. The word murder therefore cannot be construed in the light of definition given in IPC, Section 300. It should be construed with reference to the object with which this provision is made and the object is to deny the benefit to a person from his own crime. Giving a technical meaning to the word "murder" would therefore defeat the very object of legislation and would also be against the rules of equity, justice and good conscience and also against the public policy enshrined in Section 25 HSA.[12] The Bombay High Court in *Kenchava Kam Sanyellappa* v. *Girimallappa Channappa Samasagar*[13] had expressed the same view which was accepted by the Privy Council.

It is therefore the criminal act of murder, or abetment of murder that disqualifies. It is the motive of the heir guilty of murder or of abetment thereof that disqualifies him. However simply a charge or suspicion against him cannot disqualify him.[14]

In *Seetharamaiah* v. *Rama Krishmaih*,[15] a person had participated in the murderous attack on his father along with others. He was not convicted under Section 302 IPC for his father's murder but the Andhra Pradesh High Court held that the son was still disqualified and observed,—

> "In order to apply the disqualification under Section 25 of the Hindu Succession Act, it is not necessary, in my opinion, that a person who committed the murder or abetted the Commission of murder must also have been convicted of the offence of murder or of abetment of murder under Section 302 IPC."[16]

6. Change of religion and loss of caste

Change of religion and loss of caste had also the same effect of exclusion from inheritance. By the provisions of the Caste Disabilities Removal Act, 1950 this prohibition is removed. However, under the Hindu Succession Act, 1956[17] conversion is made a ground for exclusion from inheritance for a Hindu and his descendants unless the children or descendants are Hindus at the time when the succession opens.

---

10. Hindu Succession Act, 1956.
11. AIR 1982 Bom 68.
12. See *Board of Muslim Wakfs, Rajasthan* v. *Radha Kishan*, (1979) 2 SCC 468: AIR 1979 SC 289. (For construction of this word).
13. AIR 1924 PC 209: 51 IA 368: 82 IC 966.
14. *Chaman Lall* v. *Mohan Lall*, AIR 1977 Del 97.
15. AIR 1970 AP 407, 441.
16. Per Obul Reddy, J.
17. S. 26. *See also* Freedom of Religion Act, 1850.

7. Adoption of a religious order

Becoming a Sanyasi is to renounce all worldly things. In law it amounts to a civil death. That a person has adopted a religious order, must be proved by showing his absolute abandonment of all secular property and a complete and final withdrawal from earthly affairs.[18]

8. Custom

In certain communities or families custom disqualified a daughter from inheriting. In one case it was so proved. However, in view of the policy of the 1956 Act, this does not appear to be good law.

C. EFFECT OF DISQUALIFICATION

As provided by the 1956 Act[19], "if any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the intestate."

D. EXCLUSION FROM PARTITION

The above disabilities which exclude a person from inheritance also exclude him from obtaining a share of the joint family property on partition.

E. LAW FROM 1956

See Hindu Succession Act, 1956.

(**Nota bene**: In continuation of this chapter, readers may refer to Chapter XVII in this book for codified law.)

---

18. *Kondol Row* v. *Swamulavaru*, 33 Mad LJ 63.
19. S. 27.

Chapter XV

Law as to Illegitimate Children

SYNOPSIS

A. Maintenance
B. Joint family property and partition
C. Guardianship
D. Inheritance

A. MAINTENANCE

Prior to the 1956 Act[1] an illegitimate son even though he was the outcome of an adulterous intercourse or casual intercourse was entitled to be maintained by his putative father's coparcenary property as well as out of his self-acquired property.[2] Whether the father had property or not was not a question to be taken into consideration. He was bound to maintain him during the period of his minority. As observed in *Anjaratnam case*[3] such a son has no heritable capacity to his putative father among *dwijas* however he was entitled to maintenance in recognition of his status as a member of his father's family. Consequently he was entitled to maintenance firstly from his father's separate property, and in case there was no such property left, from the joint family property.

Among the *Shudras*, since an illegitimate son could not inherit as a *Dasiputra*, he was entitled to maintenance.[4] Here the important point was that if the mother was not a Hindu this right was not enforceable under the Hindu law. Under the circumstances the illegitimate son could proceed against his putative father for maintenance.

Under the *Dayabhaga* law an illegitimate son was entitled to maintenance only during his minority. However, if a Hindu begets a son by a non-Hindu woman, such a son was not entitled to maintenance under Hindu law.

As regards illegitimate daughters, prior to 1956, they were without remedy under the Hindu law;[5] but they could proceed under the Criminal Procedure Code for the purpose during the putative father's lifetime, because, after the death of the putative father, such a right could not be enforced.

This was the position before 1956. But now, under the Hindu Adoptions and Maintenance Act, 1956, the position has changed. A Hindu is now bound, during his or her lifetime, to maintain his or her illegitimate child.[6] The obligation to maintain lies upon both, the father and the mother. The wording of this section is very clear to show that not only the illegitimate son but also an

---

1. Hindu Adoptions and Maintenance Act, 1956.
2. *Muthuswami* v. *Venkateswara*, (1863) 12 MIA 203; *Subramania* v. *Velu*, ILR (1911) 34 Mad 68.
3. *Anjaratnam* v. *Narayan Rao*, AIR 1953 SC 433.
4. *Vellaiyappa* v. *Natarajan*, AIR 1931 PC 294.
5. *Ibid.*; also see *Vellaiyappa* v. *Natarajan*, AIR 1927 Mad 386 on appeal AIR 1931 PC 294; *Padmavati* v. *Ramachandra*, AIR 1951 Ori 248.
6. S. 20.

illegitimate daughter is to be maintained. Of course, this right is limited only up to the child's minority. After the child attains majority, such a right ceases to exist. Similarly if such a child ceases to be a Hindu on account of conversion to another religion, his/her right to be maintained comes to an end. The Act further clarifies that such an illegitimate son so long as he is minor and such an illegitimate daughter so long as she remains unmarried are entitled to be maintained by the heirs of the deceased out of the estate inherited by them. Here also the son or daughter should not cease to be a Hindu if they claim maintenance.[7]

B. JOINT FAMILY PROPERTY AND PARTITION

As observed in *Roshan Singh case*[8] the illegitimate sons of the three upper classes: Brahmins, Vaishyas and Kshatriyas are not entitled to any share on partition; they are entitled to maintenance only. These illegitimate sons do not form a coparcenary with the father and they do not acquire any interest in the ancestral property in the hands of their father. The illegitimate son of a Shudra is, however, entitled to a share on partition.[9] But he does not acquire any interest in his father's estate and hence can not demand partition against his father, even in respect of the joint family property.[10] After his father's death he can demand and enforce partition against the legitimate sons, but he cannot do so against his father's collaterals.

On a partition between a legitimate son and an illegitimate son, the latter takes only one-half of what he would have taken if he were legitimate.[11]

Under the Hindu Succession Act, 1956 the father's undivided interest in the Mitakshara coparcenary property devolves in the manner shown in the proviso to Section 6 of the Act.

C. GUARDIANSHIP

During the minority of the illegitimate child the mother had a superior and a preferential right of guardianship compared with that of the father. Considering the Explanation to Section 3(1) and Section 6 together one may say that:

(*i*) in a case where both the parents of an illegitimate child are Hindus, Buddhists, Jains or Sikhs by religion, or

(*ii*) in a case where one of the parents of such a child is a Hindu, Buddhist, Jain or Sikh by religion, and

(*iii*) such child is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged—

then the Hindu Minority and Guardianship Act, 1956 applies to such a child and looking to Section 6 of the Act in the case of an illegitimate boy or an

---

7. S. 24, The Hindu Adoptions and Maintenance Act, 1956.
8. *Roshan Singh* v. *Balwant Singh*, (1899-1900) 27 IA 51: 22 All 191; *Chaturya* v. *Sahub Purhulad*, (1857) 7 MIA 18.
9. *Mitakshara*, Chap 1, S.12, para 2.
10. *Gur Narain Das* v. *Tahal Das*, AIR 1952 SC 225.
11. *Kamalammal* v. *Viswanantha Swami*, AIR 1923 PC 8.

illegitimate unmarried girl the mother is the natural guardian and after her the father is the natural guardian [Section 6(*b*)]. In the case of a married girl the husband is the natural guardian [Section 6(*c*)]. However, if the guardian has ceased to be a Hindu or has completely and finally renounced the world, he is not entitled to act as such [Section 6 proviso].

D. INHERITANCE

Under the uncodified Hindu law an illegitimate child was not entitled to succeed to his father and his father also had no right to inherit the property of his illegitimate child. An illegitimate child can inherit the property of his or her mother or of his or her illegitimate brother or sister. A mother of such a child could inherit the property of her illegitimate child.

Before the passing of the Hindu Succession Act, 1956, a son of a Shudra who was born to him by his concubine (and such relation being neither adulterous nor incestuous), who was continuously and exclusively kept by him till at least the time of birth of that son (called Dasiputra) was entitled to inherit, from his putative father along with his legitimate son. But after the passing of the Hindu Succession Act, 1956 an illegitimate child of a Shudra now cannot inherit his or her father's property.

Chapter XVI

Marriage

SYNOPSIS

[A]

1. Law antecedent to the Hindu Marriage Act, 1955
   - (*a*) The concept: Concept of marriage is to constitute relationship of husband and wife
   - (*b*) Its forms
   - (*c*) Ceremonies
   - (*d*) Incursions made by culture, customs and statutes
   - (*e*) Summary
2. Legislation prior to 1955
3. Changes effected by the Hindu Marriage Act, 1955
4. Overriding effect of the Act [Section 4]
   Any other law in force affecting Hindu marriage: Clause (*b*)
   General observations on the four Acts
5. Text: Sections 1, 2 and 3
6. Application of the Act [Section 2]
7. Definitions [Section 3]
   - (*a*) Custom and Usage [Section 3(*a*)]
   - (*b*) District Court [Section 3(*b*)]
   - (*c*) Full-blood and Half-blood [Section 3(*c*)]
   - (*d*) Uterine Blood [Section 3(*d*)]
   - (*e*) Prescribed [Section 3(*e*)]
   - (*f*) Sapinda relationship and Sapinda [Section 3(*f*)(*i*) and (*ii*)]
   - (*g*) Rules of Sapinda relationship
8. Degrees of prohibited relationship [Section 3(*g*)]

[B]

HINDU MARRIAGES

9. Text: Sections 5 to 8
10. Conditions for a Hindu marriage [Section 5]
    - (*a*) Parties to be Hindus
    - (*b*) Monogamy
    - (*c*) Absence of idiocy, lunacy and unsoundness of mind
    - (*d*) Age of parties
    - (*e*) Parties not to be within the "degrees of prohibited relationship"
    - (*f*) Parties not to be Sapindas of each other
    - (*g*) Additional conditions
11. Ceremonies for a Hindu marriage [Section 7]
    Innovation of new ceremonies
    Presumption of legitimacy of child
12. Registration of Hindu marriages [Section 8]
    Summary

[C]

RESTITUTION OF CONJUGAL RIGHTS AND JUDICIAL SEPARATION [SECTIONS 9 AND 10]

13. Text: Sections 9 and 10
14. Restitution of conjugal rights: General [Section 9]
    - (*a*) Society, conjugal society and matrimonial home
    - (*b*) Withdrawal
    - (*c*) Constitutionality of Section 9
15. Judicial separation [Section 10]
    - (*a*) General
    - (*b*) Grounds for judicial separation
    - (*c*) Effect and rescission of decree

[D]

NULLITY OF MARRIAGE AND DIVORCE

16. Text: Sections 11, 12, 16, 17, 18
17. Void marriages [Section 11]
    - (*a*) General
    - (*b*) Marriages that are void
    - (*c*) Declaration of nullity
    - (*d*) Interpretation of the section and application of Heydon's rule
    - (*e*) Double bigamy and nullity decree
    - (*f*) Death of one party and nullity decree
18. Voidable marriages [Section 12]
    - (*a*) General
    - (*b*) Void and voidable marriages: Difference [Sections 11 and 12]
19. Grounds for remedy of annulment of marriage under Section 12

(*a*) First ground: Impotency [Section 12(1)(*a*)]
  (*i*) What is consummation and impotence
  (*ii*) Proof
(*b*) Second ground: Unsoundness of mind, mental disorder and recurrent attacks of insanity and epilepsy [Section 12(1)(*b*)]
(*c*) Third ground: Consent obtained by force or fraud [Section 12(1)(*c*)]
(*d*) Fourth ground: Pregnancy of the bride [Section 12(1)(*d*)]

[E]

DIVORCE

20. Text: Sections 13 to 15
  (*a*) General
  (*b*) Analysis of the section [Section 13]
  (*c*) Summary of the grounds
  (*d*) Adultery
    Cases
    Valsarajan v. *Saraswathy case*
  (*e*) Cruelty
    (*i*) Meaning explained
      Summary
    (*ii*) Instances
    (*iii*) Dowry Prohibition Act, 1961 and provisions under IPC
    (*iv*) Criticism
  (*f*) Desertion
    (*i*) General
    (*ii*) Explanation
    (*iii*) Cases
      Cause for desertion, on merits, held to be reasonable
      Constructive desertion or wilful neglect
  (*g*) Conversion
  (*h*) Insanity or mental disorder
  (*i*) Leprosy
  (*j*) Venereal disease
  (*k*) Renouncing the world
  (*l*) Unheard of for seven years or more
  (*m*) Judicial separation decreed
  (*n*) Non-restitution of conjugal rights
  (*o*) Bigamy
  (*p*) Rape, sodomy and bestiality
  (*q*) Maintenance decreed to wife
  (*r*) Repudiation of marriage by wife
  (*s*) Divorce and Judicial Separation: Distinction
  (*t*) Alternative relief in divorce proceedings [Section 13-A]
    (*a*) Court's discretion
    (*b*) No discretion
  (*u*) Divorce by mutual consent [Section 13-B]
    (*i*) Requirements of the section
    (*ii*) Grounds of petition
    (*iii*) Consent
    (*iv*) Withdrawal of consent
    (*v*) Irretrievable breakdown of marriage
    (*vi*) Theories of Divorce
  (*v*) Divorce petition: When presented [Section 14]
  (*w*) When divorced persons may remarry [Section 15]

[F]

JURISDICTION AND PROCEDURE

21. Text: Sections 19 to 28-A
22. Jurisdiction of courts, petition and application of Civil Procedure Code, 1908 [Sections 19, 20 and 21]
23. Power to transfer petitions [Section 21-A], and trial, disposal [Section 21-B], evidence [Section 21-C] and proceedings [Section 22]
24. Decree and relief [Sections 23 and 23-A]
25. Desirable guiding principles
26. Alimony (maintenance) pendente lite [Section 24]
27. Permanent alimony or permanent maintenance [Section 25]
  (*a*) What amount is payable
  (*b*) Considerations before such an order
  (*c*) When such an order is varied, modified and rescinded
28. Custody of children [Section 26]
  (*a*) Court's power
  (*b*) Children
  (*c*) Welfare of the minor, a guiding principle
  (*d*) Custody
  (*e*) Maintenance
  (*f*) Children's wishes
29. Disposal of property [Section 27]
30. Appeals, orders and their enforcement [Sections 28 and 28-A]

[G]

SAVINGS AND REPEALS

31. Text: Sections 29, 30
32. Legitimacy of Children: Section 16
33. Offences relating to marriage
    (1) Deceitfully obtaining the body of a woman [Section 493]
    (2) Inducing a wrong belief of a valid marriage [Section 496]
    (3) Bigamy [Section 494]
    (4) Adultery [Section 497]
    (5) Criminal elopement [Section 498]
    (6) Feigning conversions to escape punishment for bigamous marriages
    (7) Rajasthan Dharma Swatantrya Bill, 2006

[A]

1. LAW ANTECEDENT TO THE HINDU MARRIAGE ACT, 1955

(a) The concept: Concept of marriage is to constitute relationship of husband and wife[1]

According to ancient Hindu law marriage is the last of the ten sacraments[2] and is a tie, a sacred tie, a tie which can never be broken. It is a relation established by birth to birth. According to *Smritikars* even death cannot break this relation of husband and wife which is not only sacred and religious but is a holy union also. Once created this sacred tie cannot be untied. It is not a mere contract wherein a consenting mind is indispensable.[3] The institution of marriage is a sacrament (संस्कार) and not a mere socio-legal contract.[4] Marriage improves, refines and ennobles the character[5].

The object of marriage was to enable a man and a woman perform religious duties and to beget progeny. Moreover the writers said that a man was incomplete without a woman; thus marriage fortifies the concept of oneness which is expressed by an adage, that "A woman is half of her husband (*Ardhangini*)[6] and completes him".

Every Hindu, male or female, had to marry. Where a person could not remain a perpetual celibate, or student or where he did not desire to be an ascetic (*Sanyasin*), he was enjoined by the *Shastra* to marry. Marriage, therefore, was as good as compulsory; and more so in case of a female. A girl

---

1. *Reema Agarwal* v. *Anupam*, (2004) 3 SCC 199: 2004 SCC (Cri) 699: AIR 2004 SC 1418: 2004 Cri LJ 892: (2004) 2 KLT 822.
2. *Sundaribai* v. *Shivanarayan*, ILR (1908) 32 Bom 81; *Parminder Charan Singh* v. *Harjit Kaur*, (2003) 10 SCC 161: AIR 2003 SC 2310; *Subramani* v. *M. Chandralekha*, (2005) 9 SCC 407: AIR 2005 SC 485.
3. *Shivanandy* v. *Bhagawanthymma*, AIR 1962 Mad 400.
4. *Gopal Kishan* v. *Mithilesh Kumari*, AIR 1979 All 316. See also *Amina* v. *Hasan Koya*, (2003) 6 SCC 93.
5. D.S. Sharma: *Hinduism Through the Ages*, 3rd Edn., (1967), p. 92.
6. Misreadings of the scriptural teachings gave rise to the practice of "*Sati*".

might choose a husband for herself and marry. But with the changed conditions of life, as time passed, marriage became optional for both, male and female.

Monogamy was recommended for both, male and female. It was compulsory for a female, but in the course of time relaxations were carved out for males and a male could have more than one wife at his pleasure unless legislation prohibited it.

(b) Its forms

Under the Hindu law there were two types of marriages: Customary (*Shastric*) and statutory. The ancient Hindu law recognised eight forms of *Shastric* marriages:

(*i*) *Brahma*;—(ब्राह्म);

(*ii*) *Daiva*;—(दैव);

(*iii*) *Arsha*;—(आर्ष);

(*iv*) *Prajapatya*;—(प्रजापत्य);

(*v*) *Asura*;—(आसुर);

(*vi*) *Gandharva*;—(गांधर्व);

(*vii*) *Rakshasa*; and—(राक्षस);

(*viii*) *Paishacha*—(पैशाच).

The first four forms of marriage, i.e. *Brahma*, *Daiva*, *Arsha* and *Prajapatya* which essentially consisted of the gift of the girl by the father to the groom, were called "regular" or dharmya forms of marriage. The remaining four forms: *Asura*, *Gandharva*, *Rakshasa* and *Paishacha*, were termed as "irregular" or adharmya forms of marriages. In *Asura* marriage wealth was to be given to the bride's parent by the groom, while *Gandharva* marriage was the result of an amorous inclination of the bride and the groom reciprocally. Seizure of the bride by force or fraud and marrying her was a *Rakshasa* form of marriage and when the girl was ravished when sleeping or drunk or where she was disordered in mind and afterwards married, the marriage was termed a *Paishacha* marriage. However in present times *Brahma* and *Asura* marriages are extant. The main distinction between *Brahma* and *Asura* marriage is that in the former the girl was gifted to the groom while in the latter there was a sale of the girl in consideration of a price.[7]

One could marry within one's own religion (*dharma*) and caste (*jati*) (called Endogamy) but here also marriage was not possible within one's *gotra* and *pravara* (i.e. exogamy) (i.e. descendants of three immediate paternal ancestors of founder of one's *gotra*). No lowest age for marriage was prescribed. Polygamy was permitted but polyandry was illegal.[8] The Hindu Marriage Act,

---

7. See बौधायन, 1.11.20. 10-11; नारद: XII, 44.
8. Bombay Prevention of Hindu Bigamous Marriages Act, 1946; Madras Hindu (Bigamy Prevention and Divorce) Act, 1949: Saurashtra Prevention of Hindu Bigamous Marriages Act, 1950 etc.

1955 has now made monogamy a strict rule of law. In no case is any exception permitted.

(c) Ceremonies

As said before, marriage among Hindus being a religious and sacred tie, there were three important stages wherein certain ceremonies were to be performed. They were:

(*i*) betrothal (*Vakdan*) or a formal promise to give the girl in marriage;

(*ii*) *Kanyadan*, or actual giving away (gift) of the girl in marriage or formal donation of the bride by her father; and

(*iii*) *Saptapadi*, which consisted in performing a ceremony of taking seven steps before the sacred fire by the bride and the groom.

The performance of *Saptapadi* marked the completion of a marriage. It made the marriage irrevocable. Consummation was not an essential element to make the marriage complete.

Further, the mother or a guardian of a girl could give her in marriage. Boys were married after completing studentship, by which time they became majors. It must be noted that the texts prescribed only the persons who are to give a girl in marriage but no provision for boys being given in marriage is made.

(d) Incursions made by culture, customs and statutes

After the marriage the groom was to be the swami (master) and protector of the wife. After the death of the husband her sons protected her.

This classical Indian concept of marriage gradually underwent a change which was brought about through intercourse with Islamic culture and the Christian, Jewish and Parsi cultures. Besides this, custom was mainly responsible for relaxation of marriage rites, marriage conditions[9] and divorce.

Apart from this, the Special Marriage Act of 1872, its amendment in 1923, the Hindu Widows' Remarriage Act, 1856, the Anand Marriage Act (7 of 1909), Malabar Marriage Act, 1896 (6 of 1896) were enacted in order to validate and recognise certain special types of marriages and the Child Marriage Restraint Act, 1929, the Special Marriage Act, 1954, the Arya Samaj Marriage Validation Act, 1973 and the Native Converts Marriage Dissolution Act, 1860 altered the ancient textual law in regard to marriage.

---

9. Various kinds of customary marriages came into vogue; e.g. (*i*) *Phoolvirah* (throwing a garland around the bride's neck) of Orissa; (*ii*) *Shantigrahita* (taking *shanti* water and worshipping the goddess of Tripura) marriage prevalent in Tipperah area; (*iii*) *Sarwa Swadhanam* marriage of Namboodris (wherein bride's first son is recognised as heir to the bride's father), and (*iv*) The *Pal* and the *Dang* marriages (whereunder marriage was made with widows).

(e) Summary

Dr Tahir Mahmood ably summaries this situation in his book as under:[10]

"The Hindu law of marriage, as the British rulers of India found, interpreted and applied, was, in a nutshell, as follows:

(*i*) Marriage was a holy *sanskar*; it could be solemnised in one of the eight forms recognised by law;

(*ii*) the solemnisation would be according to the Shastric or customary rites;

(*iii*) one could marry at any age, there being no lowest age of marriage, and a man could marry any number of women;

(*iv*) inter-religious and inter-caste marriages were prohibited, but the latter could be sanctioned by custom;

(*v*) marrying within one's own gotra or pravara was not allowed, except among the Shudras;

(*vi*) husband and wife would live together, the latter would submit to the wishes of the former, and the former would maintain the latter;

(*vii*) marriage was indissoluble; divorce was not permitted unless recognised by custom;[11]

(*viii*) death did not dissolve a marriage and therefore a widow could not remarry unless permitted by custom so to do.[12]

The courts in India recognised, interpreted and applied all these principles in their minutest details."[13]

2. LEGISLATION PRIOR TO 1955

During the Mughal period religious laws and rites of Hindus were not interfered with except discouraging the practice of Sati and widow's remarriage. The Britishers in India in the beginning did not interfere with the personal laws of Hindus but from the beginning of the nineteenth century they encouraged social reforms which fructified into legislative reforms.

If we make a survey of this period, from 1830 to 1947 (pre-Independence period) and 1947 to 1955 (post-Independence period)—a period of about a century and a quarter, we find the following areas wherein matrimonial reforms were effected[14]:

(*i*) Effect of death on marriage;

---

10. *Studies in Hindu Law*, 1st Edn., (1981), pp. 5, 6.
11. *Shakuntalabai* v. *L.V. Kulkarni*, (1989) 2 SCC 526; *M. Govindaraju* v. *K. Munisami Gaunder*, (1996) 5 SCC 467; *Sankarlingam* v. *Subbam*, (1894) ILR 17 Mad 479; *Premabai* v. *Channoolal*, AIR 1963 MP 57: 1962 Jab LJ 517: ILR 1964 MP 75.
12. Widow remarriage was legalised by the Hindu Windows' Remarriage Act, 1956.
13. *See* Hari Singh Gaur: *Hindu Code*, (1973), Vol. 1, Chap. III for details; Mahmood citing Gaur at p. 6.
14. *Ibid.*, pp. 6-8.

(*ii*) status of widows and their right to remarry;

(*iii*) age of consent;

(*iv*) civil marriage and its dissolution;

(*v*) guardianship;

(*vi*) age of marriage;

(*vii*) inter-religious and inter-caste marriages;

(*viii*) marriage rites;

(*ix*) customary marriage and divorce;

(*x*) bigamy;

(*xi*) dissolution of marriage; and

(*xii*) maintenance without cohabitation.

During 1813 to 1900 nine legislations[15] were passed, during 1900 to 1947 various major and minor legislations in British India by the government and the vassal States (about 19)[16] were enacted and during 1947 to 1955 as many as five

---

15. (*a*) Practice of Sati abolished by law in 1829 and was declared to be an offence. Before that in 1813 restrictions were placed on this practice. Raja Ram Mohan Roy was behind this, i.e., Regulation XVII of 1829.
    (*b*) At the instance of Pandit Ishwar Chandra Vidyasagar the Hindu Widows' Remarriage Act, 1856 was brought on the statute book. It legalised remarriage of a Hindu widow.
    (*c*) The Indian Penal Code, 1860 prohibited polygamy but excluded from its purview the rules of Hindu law through carefully selected language. *See* Section 494, IPC.
    (*d*) Native Converts' Marriage Dissolution Act of 1866 facilitated divorce for Hindus accepting Christian faith—Act XXI of 1866.
    (*e*) Special Marriage Act, 1872. All Hindus were excluded from its ambit.
    (*f*) The Indian Divorce Act, 1869. It also remained inapplicable to Hindus.
    (*g*) The Majority Act, 1875. In cases of marriage, divorce, dower and adoption, this was inapplicable.
    (*h*) The Guardians and Wards Act, 1890 had an impact on Hindu Law.
    (*i*) Reforms of marriage-age traditional rules were made in 1894. Mysore State enforced them in the State of Mysore.

16. (*a*) The Anand Marriage Act, 1909 legalised the Sikh marriage rite known as Anand.
    (*b*) As a result of H.S. Gaur's efforts, the Special Marriage Act, 1872 was amended in 1923 legalising inter-religious civil marriages between Hindus, Buddhists, Sikhs and Jains.
    (*c*) States of Kota, Rajkot, Indore, Mandi, Baroda and Kashmir, during 1927-28 began to enforce marriage-age laws on the lines of the Mysore State. (*See* above)
        (*i*) Kota law, 1927, (*ii*) Rajkot law 1927, (*iii*) Indore Child Marriage Prevention Act, 1928 and Prohibition of Marriage Between Old Men and Minor Girls Act, 1927), (*iv*) Mandi law of Chait 1, 1985 B, (*v*) Baroda Infant Marriage Prevention Act, 1927, (*vi*) Kashmir Infant Marriage Prevention Act, 1928.
    (*d*) Child Marriage (Restraint) Act, 1929, which is popularly known as SARDA Act was passed and enforced all over British India. By lending his name to this Act Raja Saheb Harbilas Sarda became immortal so to say.
    (*e*) In 1937, the Arya Marriage Validation Act recognised the legality of inter-caste marriages and marriages with converts to Hinduism, among the Arya Samajists.

legislations[17] were passed.

3. CHANGES EFFECTED BY THE HINDU MARRIAGE ACT, 1955

The new Act has made radical and substantial changes in the institution of marriage under the ancient Hindu law. These salient features may be summarised as under:

(1) A Hindu marriage is now not so much concerned with religion. It is more a result of mutual consent than sacramental [Sections 5(*ii*), (*iii*), 11 to 13 and 7].

(2) From Section 2 it follows that marriages amongst Hindus, Jains, Sikhs and Buddhists are now valid Hindu marriages in the eyes of the law.

(3) As per Section 3 the divergence between the Mitakshara and Dayabhaga schools in connection with the expression "prohibited degrees of relationship" for the purpose of marriage is now removed. The strict rule prohibiting marriages within the limits of Sapinda relationship, as defined in the Smritis, has been considerably relaxed. Some new degrees of relationship have also been added. Thus one cannot now marry a person who was the wife of the brother of the other.

(4) Monogamy amongst the Hindus is introduced for the first time by the Act. Bigamy is now punished under the Indian Penal Code. The conditions and requirements of a valid marriage are now very much simplified as is evident from the provisions of Sections 5 and 17 of the Act.

(5) Caste considerations for inter-caste and inter-communal marriages have now been made irrelevant, eliminating all restrictions thereupon.

(6) As seen before there were different kinds of marriages in vogue before the Act. Now they are of no consequence and the only form of marriage will be that accepted by the parties as prevailing in his or her community (Section 7).

(*f*) In Cochin and Travancore States and in Chennai, Acts were passed regarding customary laws of marriage and divorce.

(*g*) In Baroda and Mysore States the traditional law was reformed in 1937 and 1933 respectively.

(*h*) Hindu Marriage Disabilities Removal Act, 1946 and the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, were enacted by the Central legislature in 1946. Both of these Acts are now repealed.

17. (*a*) Hindu Divorce Act, 1947 was enacted and enforced in Mumbai. (Now *repealed.*)

(*b*) Hindu Marriage Validity Act, 1949 legalised inter-religious marriages. (Now *repealed.*)

(*c*) The Hindu (Bigamy Prevention and Divorce) Act, 1949 was passed and enforced.

(*d*) In Saurashtra, the Hindu Bigamous Marriage Act, 1950 and the Hindu Divorce Act, 1952 were passed and enforced.

(*e*) Madhya Pradesh also in 1955 enacted the Prevention of Hindu Bigamous Marriage Act and enforced it.

(7) The Act now makes no distinction between the marriage of a maiden and the marriage of a widow.

(8) The ancient Hindu law did not prescribe any age for marriage but it is now a condition of marriage that the bridegroom must have completed 21 years and the bride must have completed the age of 18 years (Section 5).

(9) The Act now lays down conditions of a valid marriage and does not recognise any particular form of a Hindu marriage (Section 5).

(10) For a valid Hindu marriage no particular ceremony is prescribed by the Act. Sections 5 and 7 lay down that such a marriage can be solemnised in accordance with the customary rights and ceremonies of any one of the parties to the marriage.

(11) Provision for registration of Hindu marriages has been provided for the first time.

(12) Eliminating restrictions based on gotra, pravara and Sapinda relationship the Act makes provisions for judicial separation, for divorce and for annulment of marriages (*see* Sections 10, 13, 14 and 11, 12).

(13) Provisions for restitution of conjugal rights of the parties are contained in Section 9.

(14) After a valid divorce either party may remarry. This is provided by Section 15.

(15) Provisions for legitimacy of children born out of alliances which may be subsequently declared annulled or void or voidable have been made by Section 16.

(16) Section 24 of the Act makes provisions for maintenance *pendente lite* and for expenses of legal proceedings.

(17) Similarly Section 25 provides for permanent alimony and maintenance.

(18) Section 26 of the Act provides for the custody, maintenance and education of minor children during the pendency of legal proceedings as also after passing of decree.

4. OVERRIDING EFFECT OF THE ACT [SECTION 4]

1. *Short title and extent.*—(1) This Act may be called the Hindu Marriage Act, 1955.

(2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

The Act came into force on 18-5-1955. It extends to the whole of India and applies to Hindus domiciled in the territories to which this Act extends who are outside the said territories. The Act is applied to the State of Jammu and Kashmir by appropriate legislation.

4. *Overriding effect of the Act.*— Save as otherwise expressly provided in this Act—

(*a*) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(*b*) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

The Act seeks to abrogate all the existing laws which are inconsistent with the Act, whether they are in the shape of ancient texts, customs, usages or legislative enactments [Section 4(*a*)]. It also supersedes any other law contained in any central or State legislation in force prior to the commencement of this Act, in so far as it is inconsistent with any of the provisions contained in this Act.[18]

Any other law in force affecting Hindu Marriage: Clause (b)

In so far as the provision in clause (*b*) is concerned the other laws whether central or state also lose their force in regard to matters for which provision is made in this Act. That is, they are subject to overriding effect of the provisions of this Act.[19]

The difference between clause (*a*) and clause (*b*) is that clause (*a*) applies to those texts, rules, interpretation and customs or usage of the Hindu law for which provision is made in HMA. But clause (*b*) covers—

(*i*) Those laws which are not derived from any text, rule interpretation, and custom or usage of the Hindu law but are derived from some other source or sources of law, e.g. legislations which relate to marriage but which are in consistent with the provisions of this Act.

(*ii*) The Hindu law on any topic other than marriage and which is inconsistent with any provisions of this Act. It may be contained in any text, rule, interpretation, legislation or any other source of law.

(*iii*) any law *relating to any* matter which is inconsistent with the provisions of the HMA. It may be general or particular law, or the *lex loci* or *lex personam*; it may be derived from any source.

Sankarappa v. *Basamma*,[20] is an example on the point. In this case the court held that Section 9 of the CPC, 1908 and Section 43 of the Specific Relief Act,

---

18. *Yamunabai Anantrao Adhav* v. *Anantrao Shivram Adhav*, (1988) 1 SCC 530. (Law and custom permitting bigamy have now lost their force due to overriding effect of S. 4 of the HMA). In *Haisnam Baruniton Singh* v. *T.N. Haisnam Ongbi Bhani Devi*, (1961) 2 Cri LJ 258. It was held that custom permitting polygamy in Manipur was repealed or overridden by S. 4(*a*) as it contravened S. 5(*i*) of the HMA.
19. For example see *Arun Kumar Agarwal* v. *Radha Arun*, (2002) 1 HLR 121 (Kant) (case of adultery).
20. AIR 1964 Mys 247.

1963 do not oppose any provisions of the HMA. A wife can therefore, sue her husband for restraining him from marrying again under these provisions.[21]

However, it must be remembered that the Act does not affect (Section 4):

(1) The provisions contained in the Special Marriage Act, 1954 with respect to marriages solemnised under that Act between Hindus, whether before or after the commencement of the Hindu Marriage Act, 1955 [Section 29(4)].

(2) The provisions contained in Chapter III of the Special Marriage Act, 1954, providing for registration of marriages.

(3) Pending proceedings for the termination of marriage or for judicial separation (Section 29).

(4) The right to terminate a Hindu marriage recognised by custom or conferred by any special enactment (Section 29).

(5) A custom permitting a marriage between persons within the prohibited degrees of relationship (Section 5).

(6) A custom permitting marriage between Sapindas [Section 5(*v*)].

The provisions of this Act have such an overriding effect that it is only the District Court that can exercise jurisdiction in respect of matrimonial reliefs; and the jurisdiction of the regular courts except the District Court to entertain applications for such reliefs has been impliedly taken away[22] (Section 19).

Matters regarding which no provision has been made in the Act and which are not inconsistent therewith will continue to be governed by the old Hindu law in force immediately before the commencement of this Act.[23]

The Act has no retrospective operation. It therefore does not affect the validity of marriages solemnised before its commencement, i.e. before 18-5-1955, except in cases specified in the Act.

General observation on the four Acts

Regarding personal laws of Hindus and Mahommedans there is an opinion of a group of jurists that these laws when tested on the anvil of various constitutional provisions (e.g., Articles 13, 14, 15, 17, 25, 26, 29 and Part III) they fall short of the ideals, principles and provisions laid down in the Constitution. They look discriminatory, either a religious-based discrimination, or sex-based discrimination or area-based discrimination. Dr Tahir Mahmood[24]

---

21. See also *Sasanka Shekhar Basu* v. *Dipika Roy*, (1993) 2 HLR 24 Cal.
22. *Bharwan Bai* v. *Lila Ram*, AIR 1963 Punj 118.
23. *Kailashwati* v. *Ayodhia Parkash*, 1997 MLR 79 (P&H): 1977 HLR 175 (Held that the HMA does not say anything about the general material duties and obligations of the husband and wife to each other. Hence they are not affected by the passing of this Act. They obtain as they existed under the old law).
For details of such disparities and discriminations one may look into Dr Tahir Mahmood: *Personal Laws in Crisis* and A.M. Bhattacharjee: *Hindu Law and the Constitution*, (1987).

in his *Gajendragadkar Lectures*[25] has also referred to Justice A.M. Bhattacharjee's similar opinion on this matter.[26] However the Supreme Court does not consider these personal laws as being in violation of the Constitution.[27] Dr Mahmood agreeing with the Supreme Court's observations rightly observes that—

> "...laws must change where they have failed us. But when we have failed them, we must change. Changing the law for the sake of change is constitutionally unwarranted and socially undesirable. Change must come wherever necessary, but we must make sure that what we are heading for will in fact be a change for the better. Under the colour of personal law reform we must not be falling, socially and culturally, from the frying pan into the fire.
>
> Regarding conformity of laws to Part III of the Constitution we must accept the reality that this cannot and need not be achieved in the field of personal laws as vigorously and strictly as in the other branches of law."

However, it must be said that the object of the Act and its purpose is to maintain marital relationship, not to encourage break-up of such relationship.[28]

5. TEXT: SECTIONS 1, 2 and 3

THE HINDU MARRIAGE ACT, 1955

[18th May, 1955]

An Act to amend and codify the law relating to marriage among Hindus

Be it enacted by Parliament in the Sixth Year of Republic of India as follows:

Preliminary

1. *Short title and extent.*—(1) This Act may be called The Hindu Marriage Act, 1955.

(2) It extends to the whole of India except the State of Jammu and Kashmir and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

2. *Application of Act.*— (1) This Act applies—

(*a*) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(*b*) to any person who is a Buddhist, Jaina or Sikh by religion, and

(*c*) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

***Explanation.*—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:**

(*a*) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

---

25. 1986 Edn.
26. *See* A.M. Bhattacharjee: *Hindu Law and the Constitutution*, (1981).
27. *Krishna Singh* v. *Mathura Ahir*, (1981) 3 SCC 689: AIR 1980 SC 707.
28. *Hirachand Srinivas Managaonkar* v. *Sunanda*, (2001) 4 SCC 125: AIR 2001 SC 1285.

(*b*) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and

(*c*) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

3. *Definitions.*—In this Act, unless the context otherwise requires—

(*a*) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family;

(*b*) "district court" means, in any area for which there is a city civil court, that court, and in any other area the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act;

(*c*) "full-blood" and "half blood"—two persons are said to be related to each other by full-blood when they are descended from a common ancestor by the same wife and by half-blood when they are descended from a common ancestor but by different wives;

(*d*) "uterine blood"—two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands;

Explanation.—In clauses (*c*) and (*d*), 'ancestor' includes the father and "ancestress" the mother;

(*e*) "prescribed" means prescribed by rules made under this Act;

(*f*) (*i*) "sapinda relationship" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation;

(*ii*) two persons are said to be "sapindas" of each other if one is a lineal ascendant of the other within the limits of sapinda relationship, or if they have common lineal ascendant who is within the limits of sapinda relationship with reference to each of them;

(*g*) "degrees of prohibited relationship"—two persons are said to be within the "degrees of prohibited relationship"—

(*i*) if one is a lineal ascendant of the other; or

(*ii*) if one was the wife or husband of a lineal ascendant or descendant of the other; or

(*iii*) if one was the wife of the brother or of the father's or mother's brother or of the grandfather's or grandmother's brother of the other; or

(iv) if the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters;

***Explanation.*—For the purpose of clauses (*f*) and (*g*), relationship includes—**

(*i*) relationship by half or uterine blood as well as by full blood;

(*ii*) illegitimate blood relationship as well as legitimate;

(*iii*) relationship by adoption as well as by blood;

and all terms of relationship in those clauses shall be construed accordingly.

6. APPLICATION OF THE ACT [SECTION 2]

A preamble is a key to open the mind of the legislature. A preamble of a statute is also a part of the Act and is accepted as an aid in construing a provision. It is useful to ascertain legislative intention, but it cannot be used to control or qualify the precise and unambiguous language of the enactment.[29] A mere difference between the plain meaning of a provision and the scope of the preamble does not itself mean that the provision is ambiguous.[30]

The Act applies to the marriage of persons both of whom are Hindus. As sub-section (2) of Section 1 clarifies it applies not only to Hindus within the territory of India but also to Hindus domiciled in India and living abroad. The Act is now applied to Hindus in the State of Jammu and Kashmir by appropriate legislation.[31]

Section 2 is in *pari materia* with Section 2 of the Hindu Succession Act, 1956, Section 3 of the Hindu Minority and Guardianship Act, 1956 and Section 2 of the Hindu Adoptions and Maintenance Act, 1956.

The Act does not apply to a person who neither resides in India nor has Indian domicile.[32]

Section 2 contains the principal application clause of this Act. It lays down the list of persons who would be governed by this Act. These persons can be brought under the following three main groups:[33]

(1) Persons who are Hindus by religion—Section 2(1)(*a*);

(2) Persons who are Buddhists, Jains and Sikhs by religion—Section 2(1)(*b*); and

(3) any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion—Section 2(1)(*c*).

---

29. *LDA* v. *M.K. Gupta*, (1994) 1 SCC 243; see also *Anit Das* v *State of Bihar*, (2000) 5 SCC 488: AIR 2000 SC 2264.
30. *Tribhuvam* v. *Union of India*, (1969) 3 SCC 99; *Rehman* v. *State of Kerala*, (1968) SCD 552; *Jayantilal* v. *Mehta Chhanalal*, AIR 1968 Guj 212; 9 GLR 129.
31. Jammu and Kashmir Hindu Marriage Act, 1955 (this was by its own legislation; See J&K Gazette dated 7-11-1955).
32. *Gour Gopal Roy* v. *Sipra Roy*, AIR 1978 Cal 163 (SB): 1978 MLR 100 (Cal): 1978 HLR 224.
33. *See* Dr T. Mahmood's *Hindu Law*, (1981), pp. 28-30.

We may consider these groups one by one:

The *first group* includes all Hindus by religion in any of its forms or developments. In the term Hindu, therefore, the following sub-communities are included who are considered as Hindus by religion:

(*i*) Virshaivas;

(*ii*) Lingayats;

(*iii*) Brahmo Samajists;

(*iv*) Prarthna Samajists; and

(*v*) Arya Samajists.

In the case of *Perumal Nadar* and other cases[34] the Supreme Court has explained the term Hindu and examined the general characteristics of the Hindu religion. Accordingly a person may be a Hindu by birth or religion.[35] Under the codifying Acts the orthodox concept of the term "Hindu" has undergone a radical change and it has been given an extended meaning.

As held by the Chennai High Court in *Ratanshi* v. *Administrator-General of Chennai*[36], the term "Hindu" in the Indian Succession Act has been used in a theological sense, as distinguished from a national or racial sense. A person of non-Hindu origin may be converted to Hinduism so as to become subject to Hindu Law. Though mere profession of a theoretical allegiance, or admiration and advocacy of Hindu practices, is not sufficient, a European becomes a Hindu if he discards his religion by birth by a clear act of renunciation and adopts Hinduism and takes to the Hindu mode of life. Of course such a convert does not on conversion get any caste, but membership of a caste is not a necessary prerequisite to being a Hindu.

These Acts apply not only to Hindus by birth or religion, i.e. converts to Hinduism, but also to a large number of other persons. Any child, legitimate or illegitimate, one of whose parents is a Hindu by religion and who is brought up as a Hindu is a Hindu. Hence legitimate children of a Hindu father by a Christian mother who are brought up as Hindus would be governed by Hindu law.[37] A reference to Hindu, said the Supreme Court in *Shastri case*[38], shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion.

If a person calls himself a Hindu and is acknowledged as such by the society in which he lives, he is a Hindu. Whether a person is Hinduised completely or not is a question of fact. It cannot be gone into over again in second appeal.[39]

---

34. *Perumal Nadar* v. *Ponnuswami*, (1970) 1 SCC 605, 608: AIR 1971 SC 2352; *CWT* v. *R. Shridharan*, (1976) 4 SCC 489; *Shastri Yagnapurushdasji* v. *Muldas B. Vaishya*, AIR 1966 SC 1119.
35. *Perumal Nadar* v. *Ponnuswami*, (1970) 1 SCC 605.
36. 52 Mad 160.
37. *CWT* v. *R. Shridharan*, (1976) 4 SCC 489.
38. *Shastri Yagnapurushdasji* v. *Muldas B. Vaishya*, AIR 1966 SC 1119.
39. *Rafail Urson* v. *Bahia Urson*, AIR 1957 Pat 70.

Thus an intention to become a Hindu accompanied by conduct unequivocally expressing that intention may be sufficient evidence of conversion.[40] A person declaring himself a Hindu will be considered a Hindu as held by Kerala High Court.[41]

In this case one Yesudas, a Catholic Christian by birth and a famous playback singer, used to give devotional music in a Hindu temple and worshipped there like a Hindu. He had also filed a declaration, "I declare that I am a follower of the Hindu faith." On these facts the Court held that Yesudas was a Hindu and could not be prevented from entering the temple. Thus the Kerala High Court in this case has gone a step ahead of the proposition propounded by the Supreme Court in *Perumal* v. *Ponnuswami*[42]. It has held that when a person declares that he is a follower of the Hindu faith and if such a declaration is bona fide and not made with any ulterior motive or intention, it amounts to his having accepted the Hindu approach to God. He becomes a Hindu by conversion.

The inclusion of five sub-communities is not exhaustive. Naiks of Madhya Pradesh, who before 1955 were governed by Hindu law are also included in group one above.

Group number two includes the following religions:

(*i*) Buddhism,

(*ii*) Jainism, and

(*iii*) Sikhism [Section 2(1)(*b*)].

This provision, one may say, gives a legislative sanction to the existing law which says that though the Jains may not be Hindus by religion (Jainism, it is said, is a distinct religion) they would be governed by the same law as the Hindus.

If one of the parties to a marriage is not a Hindu. The HMA does not apply. In *Neeta Kirti Desai case*[43] the appellant contended that at the time of marriage, the husband was a Christian that he agreed, as a pre-condition to marriage that he would convert to Hinduism, but he has not; thus he obtained her consent to marriage by fraud. She sought relief under Section 12(1)(*c*) of the HMA. The Bombay High Court held that as one of the parties was a Christian, having regard to the provisions of Section 2 of the HMA, no relief could be obtained under this Act.

---

40. *Raman Nadar* v. *Snehappoo*, (1969) 3 SCC 42: AIR 1970 SC 1759; *Perumal* v. *Ponnuswami*, (1970) 1 SCC 605: (1971) 1 SCR 49. See also *C.M. Arumugham* v. *A. Rajgopal*, (1976) 1 SCC 883 (a convert may enjoy social and political privileges with the acceptance of the community of his original caste). See also *Lakshmi N. Tudu* v. *Basi Majhian*, AIR 2004 Jhar 121 (Santhal Scheduled Tribes follow Hindu tradition and are therefore Hindus).

41. *Mohandas* v. *Devaswom Board*, 1975 KLT 55.

42. (1970) 1 SCC 605: AIR 1971 SC 2352.

43. *Neeta Kirti Desai* v. *Bino Samuel George*, AIR 1998 Bom 74.

But if a party is a Hindu this definition applies irrespective of his domicile in India or anywhere else in the world.[44]

The *third group* includes:

(*i*) all those persons who are not Hindus (i.e. followers of any form or development of the Hindu religion); or

(*ii*) all those persons who are not Buddhists, Sikhs and Jains unless they are (*a*) Muslims, (*b*) Christians, (*c*) Parsis or (*d*) Jews [Section 2(1)(*c*)].

This third sub-clause of sub-section (1) of Section 2 is in a negative form. Consequently it lays down a presumption that it is to be presumed unless the contrary is proved that any person domiciled in India who is not a Muslim, Christian, Parsi or Jew by religion will be governed by this Act. Thus it is easier to say who is not a Hindu than to say as to who exactly is a Hindu.

The essence of the above discussion may be laid down in a single sentence that those who were not Hindus, Buddhists, Jains, Sikhs, Muslims, Christians, Parsis or Jews but were nevertheless governed by the Hindu law or usage in matrimonial matters before the commencement of this Act (i.e. 18-5-1955) will now be governed in those matters by the Act.

Sub-section (2) lays down an exception to the above that the Act shall not apply to the members of any Scheduled Tribe (within the meaning of clause 25 of Article 366 of the Constitution) unless the Central Government by notification so directs. So the Scheduled Tribes are not governed by this Act. The Chinese population in India and the Tibetan refugees are also covered under this exception to whom Hindu law will not apply.

The Explanation attached to sub-clause (1) of Section 2 explains that conversion or reconversion of any person to the Hindu religion attracts the application of the Act.

As observed in *Raman Nadar case*[45] by the Supreme Court an intention to become a Hindu, accompanied by conduct unequivocally expressing that intention, would be a sufficient evidence of conversion. No formal ceremony of expiation is necessary in such a case.

Hindu Law applies to—

(*i*) sons of Hindu dancing girls of the Naik caste converted to Mohammedanism where the sons are taken into the family of Hindu grandparents and are brought up as Hindus

(*ii*) a person who is born a Hindu and has not renounced the Hindu religion. If such a person departs from the standards of orthodoxy in regard to diet and ceremonial observations, he does not cease to be a Hindu. As decided by *R. Sridharan case*[46] a child who has a Hindu name and surname and whose father was a Hindu and mother a

---

44. *Varinda Singh* v. *State of Rajasthan*, (2005) 2 HLR 544 (Raj).
45. *Raman Nadar* v. *Snehappoo*, (1969) 3 SCC 42: AIR 1970 SC 1759.
46. *CWT* v. *R. Sridharan*, (1976) 4 SCC 489.

Christian, is a Hindu. Similarly, Malayala Brahmins are governed by Hindu law, unless they can be shown to have deviated in any respect and adopted different practices, like local customs, if any. Some of their rights have now been regulated by the Kerala Nambudri Act, 1958.[47]

The Act applies to "Scheduled Castes" it must be remembered.

The word Hindu, wherever it occurs in this Act, will have the above meaning explained and given to it.[48]

This Act however will not apply to those (*i*) who have renounced the Hindu religion and have become converts to some other religion, and (*ii*) persons, who descended from Hindu ancestors and on account of marriage or on account of some new occupation they were converted into a new distinct community having their own religion and usages. For example, Kalis of Myanmar belong to such community to whom the Hindu law does not apply. (*iii*) This law will not apply to children, whose either parent though a Hindu, are not brought up as Hindus, i.e. brought up as Christians or Mohammedans.

7. DEFINITIONS [SECTION 3]

This section defines the following expressions and terms used in this Act:

(*i*) Custom;

(*ii*) Usage;

(*iii*) District Court;

(*iv*) Full-blood;

(*v*) Half-blood;

(*vi*) Uterine blood;

(*vii*) Prescribed;

(*viii*) Sapinda relationship and Sapinda;

(*ix*) Degree of prohibited relationship.

(a) Custom and usage [Section 3(*a*)]

This is discussed in Chapter II, *supra*, note 7.

(b) District Court [Section 3(*b*)]

The expression means a city civil court in any area where such a court exists. In any other area it means the principal civil court of original jurisdiction. The State Government can notify such a court. The specific court to which a petition or an application under the Act could be made is to be determined by Section 3(*b*) read with Section 19 as amended in 1976.[49]

---

47. *Potti Govindan Nambudiri* v. *Keshav Govindan Potti*, (1987) 3 SCC 668, 673: AIR 1987 SC 2276, approving *Kunji Amma Narayani Amma* v. *Dhathri Antherjanan*, 1954 KLT 155.
48. It occurs in Sections 4, 5, 7, 8, 13(*i*), (*ii*), 29(1), 29(2), 29(4) of the Hindu Marriage Act, 1955.
49. Law Commission, in 1974, in its 59th report on the HMA and SMA, recommenced for the

(c) Full-blood and Half-blood [Section 3(*c*)]

Full-blood: Two persons are said to be related to each other by full-blood when they are descended from a "common ancestor by the same wife".

Half-blood: Two persons are said to be related to each other by half-blood when they are descended from a "common ancestor but by different wives".

Ancestor includes the father, and ancestress includes the mother.

(d) Uterine blood [Section 3(*d*)]

Two persons are said to be related to each other by uterine blood when they are descended from a *common ancestress* but by different husbands.

These expressions, full-blood, half-blood and uterine blood, are important only in determining Sapinda relationships or prohibited degrees in marriages.

When two brothers, for example, share both parents, i.e. their parents are the same, they are said to have full-blood relationship between them. We can name this relationship as *saga bhai* (सगा भाई). When they have the same person as their father (though not the mother), their relationship is of half-blood (in Muslim law this is called consanguine blood). And when they have the same woman as their mother (though not the father), their relationship is of uterine blood.

(e) Prescribed [Section 3(*e*)]

Prescribed means prescribed by rules made under this Act. There are two authorities under the Act empowered to make rules: (1) the State Governments, and (2) High Courts.

(f) Sapinda relationship and Sapinda [Section 3(*f*)(*i*) and (*ii*)]

This relationship with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned who is to be counted as the first generation.

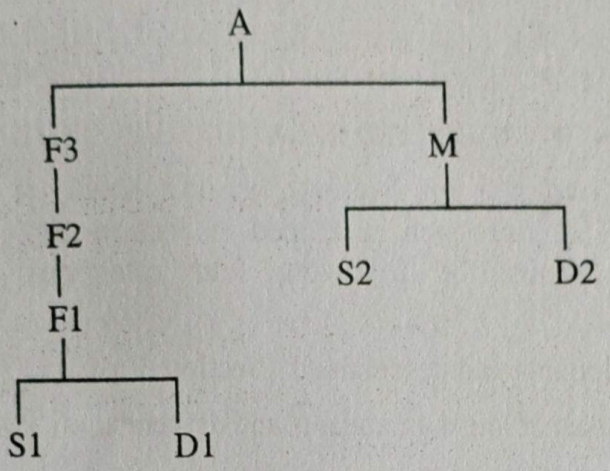
Two persons are said to be Sapindas of each other if one is a lineal ascendant of the other within the limits of Sapinda relationship, or if they have a common lineal ascendant who is within the limits of Sapinda relationship with reference to each of them.

---

establishment of such court (Family Courts). The reason given was that the approach in dealing with such Disputes has to be fundamentally different from the one that is adopted in ordinary civil disputes. Parliament therefore passed the Family Courts Act, 1984 (Act 66 of 1984) and it authorised the State governments to establish such courts in cities or towns whose population exceeds one million (10 lakh). Family Courts Act, Section 3(1)(*a*).

Andhra Pradesh High Court is of the opinion that such courts should be established in the smaller cities also — *R. Durga Prasad* v. *Union of India*, AIR 1993 AP 290.

This can be made clear by the following diagram:



In this diagram *A* is the common ancestor. He has a son *F3* and a daughter *M*.

F3 has a son *F2*.

F2 has a son *F1*.

F1 has a son *S1* and a daughter *D1*.

In the other line *M* has a son *S2* and a daughter *D2*.

Counting *S1* and *D1* as the first generation and tracing the line upwards up to *A*, it would be clear that *A* is exactly the fifth generation from either *S1* or *D1*. *F3*, *F2* and *F1* are lineal ascendants within the limit of the fifth generation. Now therefore *A*, *F3*, *F2*, *F1*, *S1* and *D1* are all Sapindas of one another.

Counting from *S2* and *D2* (and counting them as the first generation) through their mother *M* and going upwards up to *A*, it would be seen that *A* is exactly three generations away from either *S2* or *D2*. Consequently, *A*, *M*, *S2* and *D2* are all Sapindas of one another.

Now, if one looks at the diagram, on one side there are *S1*, *D1*, *F1*, *F2* and *F3*, while on the other side there are *S2*, *D2* and *M*. Both these sides have a common lineal ascendant *A* who is within the limits of Sapinda relationship with reference to each side. All of them are therefore Sapindas of one another.

(g) Rules of Sapinda relationship

It extends as far as—

(*i*) the third generation (inclusive) in the line of ascent through the mother; and

(*ii*) the fifth generation (inclusive) in the line of ascent through the father.

(*iii*) It subsists only through the father or only through the mother for both the parties. It may be through the father in the case of one party and through the mother in the case of the other party.

(*iv*) It is not limited to the whole-blood or legitimate relationship alone. It therefore includes relationship by full-blood, half-blood and uterine blood, illegitimate blood relationship and also relationship by adoption.

8. DEGREES OF PROHIBITED RELATIONSHIP [SECTION 3(*g*)]

If one looks at Section 5 and Section 3(*g*) one would see that there this expression is used. The expression is defined in Section 3(*g*). The definition placed succinctly, reveals the following four categories of prohibited relationship:

(*i*) Lineal ascendants and descendants [Section 3(*g*)(*i*)];

(*ii*) former spouses of lineal ascendants and descendants [Section 3(*g*)(*ii*)];

(*iii*) former wives of one's brothers,

former wives of one's uncles (both paternal and maternal),

former wives of one's granduncles (both paternal and maternal) [Section 3(*g*)(*iii*)]; and

(*iv*) Brother-sister,

uncle-niece,

aunt-nephew, and

all first cousins (both parallel and cross) [Section 3(*g*)(*ii*)].

Categories (*i*) and (*iv*) are based on consanguinity[50] and categories (*ii*) and (*iii*) are based on affinity.

For the purposes of clauses 3(*a*)(*f*) and 3(*a*)(*g*), relationship includes—

(*a*) both blood relationship and adoption;

(*b*) blood relationship includes (*i*) full-blood, (*ii*) half-blood, and (*iii*) uterine blood relationship.

(*c*) blood relationship also includes illegitimate as well as legitimate blood relationship.

Dr Mahmood[51] clearly summarises the above position in a tabular form as under:

TABLE

Prohibited Degrees in Marriage (PDM)

No.	*For Men*	*For Women*
(*i*)	Mother	Father
(*ii*)	Grandmother, howsoever high	Grandfather, howsoever high
(*iii*)	Former wife of father or grandfather, howsoever high	Former husband of mother or grandmother, howsoever high

50. That is, *Sapinda* relationship or of the same family or blood.
51. *Hindu Law*, (1981), pp. 54, 55

No.	For Men	For Women
(iv)	Former wife of son or grandson, howsoever low	Former husband of daughter or granddaughter, howsoever low
(v)	Former wife of brother	Brother of former husband
(vi)	Former wife of either parent's brother*	Nephew of former husband
(vii)	Former wife of grandparent's brother*	Grandnephew of former husband
(viii)	Sister*	Brother*
(ix)	Either parent's sister*	Either parent's brother*
(x)	Daughter of a brother or sister*	Son of a brother* or sister*
(xi)	Daughter of either parent's brother*	Son of either parent's brother*
(xii)	Daughter of either parent's sister*	Son of either parent's sister*.

[B]

HINDU MARRIAGES

9. TEXT: SECTIONS 5 TO 8

5. *Conditions for a Hindu Marriage.*—A marriage may be solemnized between any two Hindus,[52] if the following conditions are fulfilled, namely:

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of marriage, neither party—

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity or epilepsy;

(iii) the bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two.

6. *Guardianship in marriage*[53].—(*omitted*).

7. *Ceremonies for a Hindu marriage.*—(1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

---

* Whether by blood (legitimate or illegitimate) relationship (full, half or uterine) or by adoption.

52. *Vijaya Kumari* v. *Devabalan*, (2004) 1 HLR 7 (Ker DB).

53. *Omitted* by Act 2 of 1978, Section 6 and Schedule (w.e.f. 1-10-1978).

(2) Where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

8. *Registration of Hindu marriages.*—(1) For the purpose of facilitating the proof of Hindu marriages, the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such conditions as may be prescribed in a Hindu Marriage Register kept for the purpose.

(2) Notwithstanding anything contained in sub-section (1), the State Government may, if it is of opinion that it is necessary or expedient so to do, provide that the entering of the particulars referred to in sub-section (1) shall be compulsory in the State or in any part thereof, whether in all cases or in such cases as may be specified, and where any such direction has been issued, any person contravening any rule made in this behalf shall be punishable with fine which may extend to twenty-five rupees.

(3) All rules made under this section shall be laid before the State Legislature, as soon as may be, after they are made.

(4) The Hindu Marriage Register shall at all reasonable times be open for inspection, and shall be admissible as evidence of the statements therein contained and certified extracts therefrom shall, on application, be given by the Registrar on payment to him of the prescribed fee.

(5) Notwithstanding anything contained in this section, the validity of any Hindu marriage shall in no way be affected by the omission to make the entry.

10. CONDITIONS FOR A HINDU MARRIAGE [SECTION 5]

Requirements of a valid marriage have been laid down by the section. This section has got its connection with Sections 11, 12, 17 and 18. Both the parties to the marriage must be Hindus.[54] These sections lay down the effect of the absence of or the non-fulfilment of the conditions laid down by Section 5. These conditions are:

(a) Parties to be Hindus

Both the parties to the marriage must be Hindus. If one of them is a non-Hindu. The marriage will not be a subject matter of this Act. In *Vijaya Kumari* v. *Devabalan*[55], a Hindu married a Christian woman. The Kerala High Court observed that the marriage was not a valid marriage under HMA.

(*i*) neither party should have a spouse living at the time of marriage;

(*ii*) at the time of marriage, neither party—

(*a*) is incapable of giving a valid consent due to unsoundness of mind; or

(*b*) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent, as to be unfit for marriage and for procreation of children; or

---

54. *T. Perumal* v. *R. Nasammal*, AIR 2004 Mad 37.

55. (2004) 1 HLR 7 (Ker DB); *Chitralekha* v. *Shibu Kunuju*, (1998) 2 DMC 454 (Bom DB) Marriage between Christian Husband and a Hindu female. HMA did not apply. But in *AA Belasundaram* v. *A. Vijay Kumar marriage* between a Hindu male and Christian female performed according to Hindu rites was held to be neither void u/s 11 nor voidable u/s 12 of the Act. The case was about maintenance u/s 125 of CrPC, (1991) 1 HLR 383 (AP).

(*c*) is subject to recurrent attacks of insanity or epilepsy;

(*iii*) at the time of marriage the age of the bridegroom should be 21 years complete and bride's age should be 18 years complete;

(*iv*) the parties are not within the degrees of prohibited relationship unless the custom permits such a marriage;

(*v*) the parties are not Sapindas of each other, unless the custom permits their marriage.

As laid down in *Lila Gupta* v. *Laxmi Narain*[56] all the conditions under Section 5 of the HMA are not mandatory.

(b) Monogamy

Condition number one implies monogamy and prohibits polygamy. Before this Act came into force polygamy was permitted; now it is prohibited. Before 1955 under ancient Hindu law polyandry was prohibited. This Act also prohibits the same and favours strict monogamy.[57]

Word "solemnize" a marriage means marriage taking place; it does not have any conceptual or juristic significance. If the first condition is broken the marriage cannot be solemnized.

The expression "neither party has a spouse living"[58] depicts that the spouse must not be alive at the time of marriage and that the word spouse means a spouse in the eyes of the law. If the spouse is alive at the time of marriage that could bar the remarriage of a person. We may safely say therefore that a bachelor who has so far not married, a widow or a widower and a divorcee who has lawfully divorced his wife can lawfully marry. Marriage is not dissolved with the filing of a petition for divorce. It subsists until a final decree for divorce is passed. If a person marries another person meanwhile heridates this condition.[59] Of course the other conditions of Section 5 must be fulfilled.

However one must note that the first marriage of a person (he or she) which is a bar to that person's second marriage should be a legally valid marriage which is a duly performed marriage, i.e. it should be a valid and enforceable marriage. In spite of one's valid marriage, if the person remarries in violation of Section 5(*i*), the second marriage would be null and void and he will be subjected to penal consequences.[60] In such a case the second marriage can be declared a nullity by a competent court. As declared by the Supreme Court[61] such a marriage is null and void and not merely voidable under Section 12 of

---

56. (1978) 3 SCC 258: AIR 1978 SC 1351.
57. Section 11 HMA; *Nallagondha Kanthamma* v. *Nallagondha Rajyam*, (2005) 1 HLR 21 (AP). (Marriage against this condition is void and the party contravening it is punishable under Sections 494 & 495 of IPC, read with Section 17 of this Act.
58. *Arjun* v. *Tihari Bai*, (1999) 1 HLR 644 (MP) a concubine is not a spouse.
59. *Jayalakshmi* v. *Gayathri*, (1998) 1 HLR 509 (Kant).
60. In this connection *see* Sections 11 and 17 of this Act. *See also* Section 494, IPC under which punishment for this offence is 7 years' imprisonment and fine.
61. *Yamunabai A. Adhav* v. *A.S. Adhav*, (1988) 1 SCC 530: AIR 1988 SC 644.

the Act. Even after the death of one spouse such a marriage can be declared null and void.[62]

One important aspect of this Act is that there is no provision under which a wife may make a petition for an injunction restraining the husband from taking a wife. However an injunction to prohibit a marriage can only be issued where a guardian's consent for such a marriage is required and the interest of the bride requires such prohibition.[63]

The Scheduled Tribes are excepted from the application of the Act. But there must be a proved custom to this effect (i.e. for bigamy).[64] Section (2) HMA.

A Hindu male cannot change his religious and accept Islam in order to marry more than one wife.[65]

A contention that the provision against bigamy contravenes Article 25 of the Constitution of India, which guarantees the right to free profession, practice and propagation of religion, is without substance and was rejected by the Allahabad High Court.[66]

(c) Absence of idiocy, lunacy and unsoundness of mind

Condition number two says that neither party should be an idiot, a lunatic or suffering from recurrent attacks of insanity or epilepsy.

A marriage is both, a bliss and a burden at one and the same time. A sound mind is a key to a happy married life.[67] This condition which was originally briefly stated in HMA is now detailed in three sub-clauses by the Marriage Laws (Amendment) Act, 1976.[68]

It must be remembered that under the old Hindu law a "consenting mind" was not necessary. Consequently an idiot or a lunatic could marry. The present act puts an end to this system. Regarding the controversy whether a Hindu marriage was also a contract, there are conflicting decisions but this Act puts an end to this by laying down that lunatics and idiots could not marry at all. This then makes "free consent" a necessary element of a valid Hindu marriage. Section 5(*ii*) of the amended Act[69] makes this idea clear.

An "idiot" is "he, that is a fool from his birth and knoweth not how to count or number, or cannot name his father or mother, nor of what age he himself is, or suchlike easy and common matters; so that it appeared that he has no manner of

---

62. *Krishni Devi* v. *Tulsi Devi*, AIR 1972 P&H 305.
63. *Umashankar* v. *Radha Devi*, AIR 1967 Pat 220.
64. *Shakuu Bai* v. *Siya Bai*, (1992) 2 HLR 368 (MP) Polygamy upheld.
65. See *Sarla Mudgal* v. *Union of India*, (1995) 3 SCC 635: (1996) 1 HLR 659. (Muslim law cannot be misused by a Hindu male. Hindu marriage does not automatically dissolve by apostacy. The husband violates the provisions of HMA and he is covered by Section 494 of IPC).
66. *Ram Prasad* v. *State of U.P.*, AIR 1961 All 334.
67. *Sharda* v. *Dharmpal*, (2003) 4 SCC 493.
68. *Gurnam Singh* v. *Chand Kaur*, 1980 HLR 134 (P&H).
69. Amended by the Marriage Laws (Amendment) Act, 1976.

understanding, or reason, or government of himself, or what is for his profit or disprofit".[70] "Schizophrenia" is not equivalent to lunacy or idiocy.[71]

A lunatic is "one who hath had understanding but by disease, grief or other accident hath lost the use of his reason. He is indeed properly one that hath lucid intervals, sometimes enjoying his senses and sometimes not".[72]

If insanity supervenes subsequent to the marriage, it cannot be annulled.

The onus of proof about lunacy or idiocy lies on him who makes a petition to annul the marriage.[73] The presumption is in favour of validity of marriage and in favour of mental capacity of the spouse entering into matrimony. However a marriage which takes place in contravention of this condition is not per se void but voidable under Section 12(1)(*b*).[74]

(d) Age of parties[75]

Condition number three is regarding the age of the persons entering into marriage. The bridegroom should have completed the age of 21 years and the bride the age of eighteen years at the time of marriage. Under the old Hindu law no minimum age for marriage was prescribed, while the codified law prescribes this minimum age which is in keeping with that prescribed under the Child Marriage Restraint Act. Contravention of this condition is punishable (under Section 18) with simple imprisonment which may extend up to fifteen days, or with fine which may extend to one thousand rupees, or with both.

---

70. Stroud's *Judicial Dictionary*, 2nd Edn., p. 906.
71. *Gurnam Singh* v. *Chand Kaur*, 1980 HLR 134 (P&H).
72. Stroud's *Judicial Dictionary*, 2nd Edn., p. 1130.
73. *Ram Narain Gupta* v. *Rameshwari Gupta*, (1988) 4 SCC 247: AIR 1988 SC 2260.
74. *R. Lakshmi Narayan* v. *Santhi*, (2001) 4 SCC 688.
75. *Minimum marriageable age*:

The Supreme Court took notice of the disparities in the law on child marriages and issued notices to the Centre and the Government of Delhi to remove loopholes from the laws pertaining to the minimum marriageable age in India. The Court said it would look into the existing confusion over the issue of who was a minor, the legal status of a child marriage and the minimum marriageable age.

The court also stayed two High Court judgments that had given their stamp of approval to two specific cases of runaway marriages by minor girls after the National Commission for Women (NCW) expressed fears that they could unintentionally encourage child marriages.

The present law on child marriages states that though child marriages are punishable, marriage once performed, is valid. Sections 5 and 11 of the Hindu Marriage Act, 1955, do not authorise courts to declare a marriage void on the ground that either of the parties is underage. It can be declared void only at the instance of the woman, that too, when she becomes a major. Also the law on the rape of a minor girl is equally discriminating. Rape of a minor girl is punishable and a man who marries a minor girl can be held guilty of rape, but a husband can have sex with his minor wife. (*Hindustan Times*, March 28). —Lawyers' Collective, April 2006 at p. 5.

In this connection one may profitably go through the issue of the Journal of the Indian Law Institute (April-June 2006)— 48 JILI 2006, p. 290-293—Book Reviews Section wherein a book entitled *Child Marriage In India: Socio-Legal And Human Rights Dimensions* (2005) by Jaya Sagade is reviewed. Sagade's work is a socio-legal study and the closeness with which the legal texts have been read is the strongest and must readable part of the work (Chapter 283, pp. 35-110). Child marriages should be banned in her opinion. For this she favours public interest litigation to be filed. By her work the author has alerted State and Civil Society on the baneful effects of this much tolerated social practice.

However, breach of this condition does not make the marriage void or voidable. That means it is valid though it may attract penalties. This view is held by various High Courts.[76] The Andhra Pradesh High Court subsequently overruled its former view which is approved by the Supreme Court. This means that breach of this condition provides a cause for divorce.[77] This Act itself provides a ground for repudiation of the marriage in Section 13(2)(*iv*).

(e) Parties not to be within the "degrees of prohibited relationship"

The expression "degree of prohibited relationship" is defined in Section 3, *supra*. Marriage between the children of a brother and a sister[78] or the children of two sisters[79] or with the wife of the step-brother[80] is violative of this condition, being within the prohibited degrees.

Gay Marriages or Lesbian Marriages or Same Sex Marriages

Marriage should be and always is between parties of two opposite sexes. This is so apparent, clear, explicit and natural that in the law of marriage this condition is not expressly laid down. Marriage is a sacrament.

But now-a-days same sex marriages are permitted. Same-sex registered partnerships/civil unions are permitted in Denmark, Norway, Sweden, Iceland, France, Vermont, USA, Germany, Finland, Luxembourg, New Zealand, Connecticut, USA, Britain, New Jersey, USA, New Hampshire, USA and Oregon, USA and same-sex marriages are permitted in The Netherlands, Belgium, Massachusetts, USA, Canada, Spain and South Africa (Source: www.about.com). This may be termed as "Gay Marriage" or "Lesbian Marriage."[81] It must be marked that the word marriage is misused[82] here.

---

76. Himachal Pradesh, Punjab and Haryana, Orissa and Andhra Pradesh.
77. *Venkata Raman* v. *State*, AIR 1977 AP 43 (FB).
78. *Sanjib Kumar Mondol* v. *Sipra Mondol*, (2004) 1 HLR 299 (Cal).
79. *Arima Biswas* v. *Dipankar Biswas*, (2004) 2 HLR 44 (Cal).
80. *Ramavati Gupta* v. *State of U.P.*, (1985) 1 HLR 214 (All).
81. Lesbianism has properly never been criminal in the UK, unless probably in circumstances affronting public decency. In India see Article 21: Constitution regarding "Protection of life and personal liberty".
82. Proponents of same-sex marriage often use the term "equal marriage" to stress that they seek equality as opposed to special rights; the term "equal marriage" has also been used by feminists to describe any marriage, regardless of the sex of the partners, in which the partners have equal status within the marriage. Opponents argue that equating same-sex and opposite-sex marriage changes the meaning of marriage and its traditions. Some opponents use the term "homosexual marriage", and surveys have suggested that the word "homosexual" is more stigmatizing than the word "gay". Some publications that oppose same-sex marriage put the word marriage in scare quotes when referring to it Notable publications that practice this are *The Washington Times and LifeSite*. Cliff Kincaid, a writer for the American conservative-based media watchdog group Accuracy in Media, agrees with this method arguing that "marriage" is a word that same-sex couples merely want to apply to themselves, but have no legal ability to do so in most States in the United States. Same-sex marriage supporters argue that it is editorializing and implying inferiority, and point out that the quotes are even used when referring to same-sex marriages in locations where it is legal.

Marriage is for sexual pleasure and for procreation of children, but in gay marriages procreation of children is not at all possible.

(f) Parties not to be Sapindas of each other

The expression "sapinda" is explained in Section 3, *supra*. The net of Sapinda relationship extends—

(*a*) as far as the third generation (inclusive) in the line of ascent through the mother, and

(*b*) as far as the fifth generation (inclusive) in the line of ascent through the father.

There is no unanimous agreement amongst writers and commentators regarding the exact meaning of the expression "line of ascent", i.e. whether the line of ascent through the mother or through the father include both parents of the mother or of the father. No judicial clarification is available on this rather difficult question.

Marriage between Sapindas would be valid if the custom or usage governing each of them permits such a marriage. However the custom must be a valid one, as laid down in Section 3.

(g) Additional conditions

There are other conditions of a valid marriage which though not specified are as important and as significant as the previous ones. They are:

(*a*) requirement in respect of marriage ceremony (Section 7),

(*b*) requirement regarding registration of marriage (Section 8), and

(*c*) consent of both the parties [Section 12(1)(*c*)].

We shall take them one by one.

A question[83] may be raised whether a court, on information laid before it that a marriage is about to be solemnised in violation of the conditions prescribed in Section 5, can prohibit its solemnization? No definite solution of this problem is available on this point and opinions of courts differ. However such anticipatory prohibition is necessary in the interest of society.

Some have suggested reserving the word "marriage" for religious contexts, and in civil and legal contexts using a uniform concept of civil unions. Harvard Law professor Alan Dershowitz, for instance, wrote that such an arrangement would "strengthen the wall of separation between church and state by placing a sacred institution entirely in the hands of the church while placing a secular institution under state control". Conservative critics like *National Review's* Jennifer Morse contend that the conflation of marriage with contractual agreements is itself a threat to marriage that "has undermined more heterosexual marriages than anything, with the possible exception of adultery." However, in the case of one State in the United States in which same-sex marriages are recognized, in Massachusetts, there is a long history of marriage being regarded as purely a civil institution, as illustrated in the Reverend William Bradford's history *Of Plymouth Plantation*. [Source: www.Wikipedia.com.]

83. *See* T. Mahmood's *Hindu Law*, p. 58 (Anticipatory Prohibition).

11. CEREMONIES FOR A HINDU MARRIAGE [SECTION 7]

On reading Section 7 it becomes clear that a marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. And where such rites and ceremonies include the *Saptapadi*, the marriage becomes complete and binding when the seventh step is taken. The Act thus gives *Saptapadi* a statutory recognition, but it does not make *Saptapadi* an obligatory one, it must be noted.

Consummation is not necessary to make a marriage valid and binding. Section 7 in fact does not prescribe any special ceremony to be gone through for a Hindu marriage.

It must be remembered that a Hindu marriage is both a sacrament and a contract. The sacrament consists of (1) invocation of the sacred fire, and (2) the *Saptapadi* wherein the bridegroom and the bride jointly take seven steps before the sacred fire. There can be a marriage acceptable in law according to the customs which do not insist on performance of such rites.[84] Ceremony means, according to this Act, customary rites and ceremonies of either party to the marriage. As judicial decisions observe, Section 7 is not in the nature of a special rule of evidence which compels the prosecution to prove the taking of the seventh step. The subsistence of the second marriage between the parties who intend to have it performed, went through it and never attempted to question it, can be taken as proof of the marriage, irrespective of whether taking of the seventh step is specifically proved.

When it is proved before a court that a marriage was in fact performed, the court will presume that it was a valid marriage[85] and that necessary ceremonies were performed.[86] A person who challenges the marriage has to rebut both these presumptions.[87]

Refer here to the "doctrine of *factum valet*" in Chapter II.

Innovation of new ceremonies

Ordinarily no one, not even a community, organization or movement is free to alter, vary or create a ceremony at one's pleasure.[88] However the Arya Samaj movement simplified the ceremonies and rites for the solemnization of marriage among the Arya Samajists. Similarly the Sikhs performed marriages by *Anand Karaj*. For this reason Acts to validate such marriages were passed.[89]

The Tamil Nadu Legislature amended the Hindu Marriage Act 1955. It has inserted therein a new Section 7-A which validates marriages known by the name of *Surya-mariyathai* or *Seerthiruththa* marriages.[90]

---

84. *Sumitra Devi* v. *Bhikhan Chaudhary*, (1985) 1 SCC 637.
85. *Fakirgauda* v. *Gangi*, 22 Bom 277.
86. *Linga* v. *Ayodhya*, AIR 1974 Ori 107.
87. *Guru Oharan* v. *Ad Dikanda*, 1972 Ori 385; *Sitabai* v. *Vithabai*, 1958 Nag 10.
88. Paras Diwan: *Law of Marriage and Divorce*, 3rd Edn., reprinted in 2000, Chap. II, p. 153.
89. Arya Marriage Validation Act, 1937; Anand Marriage Act, 1909.
90. Tamil Nadu Act 21 of 1967 (w.e.f. 20-1-1968).

A question of the validity of innovation of new ceremonies and rites came for decision before the Madras High Court in *Devani* v. *Chindavaram*[91]. In Tamil Nadu, an association known as Anti-Purohit Organisation or Self-Respectors' cult exists for more than 50 years. Its objective is to do away with the traditional rites and ceremonies prevailing among the Hindus. The Organisation has innovated simple rites and ceremonies. Marriages performed by help of these rites and ceremonies are named as *Surya-mariyathai* or *Seerthiruththa* marriages. In such a marriage the relatives and friends of the bride and bridegroom and respectable persons of the locality are invited. Someone among the invitees is requested to preside. The couple is introduced to guests. In their presence the simple ceremony of exchanging garlands and rings between the couple takes place. Two other alternative ceremonies: (*a*) a simple ceremony of tying the *thali*, or (*b*) declaration by the couple, in language understood by them that each takes the other as his wife or as her husband.

In *Devani case* the marriage was held void because no one can alter personal law. But after this decision such marriages were recognised and held to be valid and Section 7-A was inserted by an amendment. This new provision came into force from 17th January, 1968. It applies to those marriages only which are performed in the State of Tamil Nadu. The result of this statutory modification is that a mere execution of a document by the spouses that they have become husband and wife or a declaration in the presence of friends and other persons,[92] will confer the status of husband and wife on the parties [sub-section (1)(*a*) of Section 7-A].[93]

Presumption of legitimacy of child[94]

A two-judge Bench of the Supreme Court comprising K.T. Thomas and R.P. Sethi, held that the presumption under Section 112 of the Evidence Act, 1872, i.e. the child born during the subsistence of a valid marriage is the child of the husband of the mother, leans so heavily in favour of legitimacy that it cannot be rebutted even by a DNA test. The only exception to demolish the rigour of conclusive presumption under the section is the ''proof of non-access'' between the parties at the time when the child could have been conceived. The Court observed that the onus is so heavy that the husband has to prove not only that he had no opportunity to approach the wife but also that she too had no such opportunity at the relevant time.

12. REGISTRATION OF HINDU MARRIAGES [SECTION 8]

This section provides and facilitates a proof of marriage by its registration and the State Government may make rules in this regard. States can also make the registration compulsory. Details of marriage are to be entered into a register

---

91. AIR 1954 Mad 657. *See* also *Rajathi* v. *Selliah*, (1966) 2 MLJ 40.
92. *Raghubir* v. *Shanmughvadiyar*, 1971 Mad 330.
93. Paras Diwan: *Law of Marriage and Divorce*, 3rd Edn., reprinted in 2000, Ch. II, p. 154. *S. Nagalingam* v. *Sivagami*, (2001) 7 SCC 487 (presence of a priest is not necessary).
94. *Kamta Devi* v. *Poshi Rame*, AIR 2001 SC 2226.

maintained for the purpose. However the validity of any Hindu marriage shall in no way be affected by the omission to make the entry. A fine of Rs 25 may be levied for contravention of the direction to enter details in a register.

Ancient Hindu law did not have any such provision.

The section does not lay down any time limit for registration of marriages; it only empowers the State Government to make such rules as are stated in this Section[1]. The State of Mumbai had enacted a Local Registration of Marriages Act, 1954 which is not repealed and it applies to the State of Maharashtra and Gujarat.

A Hindu Marriage can be registered under the Special Marriage Act, 1954. Such a marriage thereafter becomes a civil marriage and ceases to be governed by the Hindu Marriage Act (*see* Section 18 of the Special Marriage Act, 1954).

Dr Tahir Mahmood rightly observes [2] that no State Government can make a rule that failure to register a marriage will render it invalid. Compulsory registration of marriages—if wisely provided for by means of carefully framed rules—can prevent many social evils, e.g. child marriage and dowry.

Summary

As per Section 7 a marriage is a ceremonial affair.[3] There can be no marriage by mere agreement. Living together without going through the ceremonies of marriage do not make them husband and wife. In law such woman[4] is a concubine. If one claims that his marriage is solemnised[5] and is according to prevailing new custom, that custom must be valid and recognised because, custom does not come into existence in five or seven years only.[6] Such marriages with reformist ceremonies performed by Anti-Purohit Association and conducted by Rameshwari Naicker (Paiya) were invalidated by the courts.[7] Similarly marriages performed under the Hindu Marriage (Madras Amendment) Act, 1967 to undo this conservation (datta-homa, Saptapadi etc.) were, as decided by the Supreme Court in Ananthai Case,[8] were violative of Section 5(*i*)

---

1. State Governments of Madhya Pradesh, West Bengal, Punjab, Andhra Pradesh, Karnataka, Pondicherry, Kerala, Rajasthan, U.P. and Assam have made rules regarding registration of marriages. Some of these rules have not been brought in conformity with the changes introduced by the Hindu Marriage Act during 1976-1978. They should be read subject to the changes, therefore.
2. *Hindu Law*, (1981), p. 68.
3. *Gurdev Kaur* v. *Milkhi Singh*, (1993) 1 HLR 275 (P&H); *Sant Kaur* v. *Tej Kaur*, (2004) 1 HLR 219 (P&H).
4. *Kesari Bai* v. *Parwati Bai*, (2000) 1 HLR 707 (MP); *Garja Singh* v. *Surjit Kaur*, (1991) 1 HLR 46 (P&H).
5. *Bhaurao Shankar Lokhande* v. *State of Maharashtra*, AIR 1965 SC 1564: (1965) 2 SCR 837.
6. *Ibid.*
7. *Deivanai Achi* v. *Chhidambaram*, (1955) 1 Mad LJ 120: AIR 1954 Mad 657; *Rajathi* v. *K. Selliah*, (1966) 2 Mad LJ 40; *Santi Deb Berma* v. *Kanchan Prava Devi*, 1991 Supp (2) SCC 616: AIR 1991 SC 816; *Vimla* v. *Veeraswamy*, (1991) 2 SCC 375; *Laxmi Devi* v. *Satyanarayan*, (1994) 2 HLR 449 (SC).
8. *Ananthai* v. *Mungaiah*, (2005) 1 HLR 133 (Mad); *K. Mathialagam* v. *Mala Devi*, (1991) 1 HLR 242 (Mad). Revising Author of the Modern Hindu Law favours the above amended Act in Tamil Nadu.

with its consequences under HMA, that is voidness of marriage under Section 11 and punishment under Section 17 HMA read with Section 494 and 495 of the Indian Penal Code 1860. A Hindu marriage thus requires strict proof;[9] mere distribution of Gur does not constructive the necessary ceremonies of marriage in due form.[10]

The presumption of law that the necessary ceremonies were celebrated, is rebuttable.[11] However the ceremonies may be proved by preponderance of probabilities.[12]

Where Saptapadi [sub-section (2) of Section 7] is an essential part of the ceremonies of marriage, its non-performance will invalidate the marriage. The performance of vedic rights is not enough to solemnise the marriage.[13] A marriage becomes complete and binding with the seventh round.[14] It must be noted that in HMA in sub-section (2) of Section 7 the कन्यादान is not treated as essential as the saptapadi. It cannot be dispensed with at the pleasure of the Kanya or her relatives.[15]

Registration[16] of marriage had no importance before the HMA. But besides its evidentiary value, the National Commission for Women has pointed out that it has critical importance to various women related issues, such as—

(*i*) prevention of child marriages,

(*ii*) prevention of marriages without the consent of the parties,

(*iii*) prevention of illegal bigamy or polygamy,

(*iv*) enabling married women to claim their right to live in the matrimonial home, maintenance, etc.

(*v*) enabling the widows to claim their various rights after the death of their husbands,

(*vi*) deterring men from deserting their wives after marriage, and

(*vii*) deterring sale of girls under the garb of marriage.

Of course violation of rules for registration does not make the marriage invalid (sub-section 5). In *Seema* v. *Ashwani Kumar*,[17] the Supreme Court of India has opined that registration of marriages is a matter of "vital statistics" under the concurrent list, Entry 30 and registration of marriages in all religions

---

9. *Vimala* v. *Veeraswamy*, (1991) 2 SCC 395.
10. *Surjit Kaur* v. *Garja Singh*, (1994) 1 SCC 407.
11. *Namita Patnaik* v. *Dilip Kumar Patnaik*, (2002) 1 HLR 543 (Ori DB).
12. *Vinit Kumar Bahl* v. *Ruchi*, (2003) 1 HLR 497 (P&H).
13. *Shridhar Rao* v. *Jayashri*, (1963) Mad LJ 156.
14. *Santi Deb Berma* v. *Kanchan Prava Devi*, 1991 Supp (2) SCC 616 (No marriage because performance of Saptapadi not proved).
15. *Bhaurao Shankar Lokhande* v. *State of Maharashtra*, AIR 1965 SC 1564: (1965) 2 SCR 837.
16. State Governments have been authroised to make them.
17. (2006) 2 SCC 578: (2006) 1 HLR 639.

should be made compulsory. At the same time Dr T. Mahmood's advice should be taken seriously.[18]

We have seen that directions issued by the Supreme Court in Smt. Seema v. Ashwani Kumar assumes a lot of importance. It is for the first time the Indian Supreme Court has called upon the States and the Centre to require by law, registration of marriages in India, irrespective of the caste and religion of the parties. The Court commanded to its aid the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).[19]

It is seem that courts pass innumerable orders granting maintenance to wives (divorced wives included). But very fact get enforced. It may be because the husbands are not financially capable to pay and sometimes they deliberately avoid payment because of the hatred they have got against the wives and children. In both the cases the wives are as the receiving end. Section 125 CrPC envisaged this situation and enacted a provision in sub-section (3) of Section 125 CrPC. It provided remedy for breach of Court's order. This provision came to be interpreted by the Supreme Court in *Kuldeep Kaur* v. *Surinder Singh*,[20] wherein it categorically ruled that husband's inability to pay maintenance cannot be satisfied by sending him to jail. The import of Section 125(3) was therefore spelt out in this case by the Supreme Court.[21] The court said that sending the husband to jail is a "mode of enforcement", but it is not a "mode of satisfaction" of the liability, sending him to jail does not wipe out his liability; The liability remains.

It has been suggested that in such a situation the rules for registration by states should be framed in such a manner that at the time of registration of marriage a substantial amount of fee should be charged from the parties and from this amount a fund should be created and managed so that the wives do not starve for want of maintenance. A comprehensive legislation is the desideratum.[22]

[C]

RESTITUTION OF CONJUGAL RIGHTS AND JUDICIAL SEPARATION [SECTIONS 9 AND 10]

13. TEXT: SECTIONS 9 AND 10

9. *Restitution of conjugal rights.*—(1) When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

---

18. *Hindu Law*, (1981), p. 68. See also 46 JILI, (2006) 106-11, an article by Dr Chandrasekharan Pillai, Director, ILI New Delhi.
19. Bombay Registration of Marriages Act, 1953; Karnataka Registration of Marriages "Registration and Miscellaneous Provisions" Act, 1976, Himachal Pradesh.
20. (1989) 1 SCC 405: 1989 SCC (Cri) 171: 1989 Cr LJ 794: AIR 1989 SC 232.
21. *Ibid.* at p. 235.
22. K.N. Chandrasekharan Pillai: *Regulating Marriage and Divorce — Need for a Comprehensive Legislation in* 46 JILI (2006), pp. 106-111, at 112.

Explanation.—Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.

10. *Judicial separation.*—(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of Section 13 and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.

(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

14. RESTITUTION OF CONJUGAL RIGHTS: GENERAL [SECTION 9]

Restitution in its etymological sense means restoring to a party on the modifications, variation or reversal of a decree what has been lost to it in execution of the decree or in direct consequence of the decree.[23] "Conjugal" means matrimonial or marital. The expression restitution of conjugal rights, therefore, means restoration of marital rights of a party which were lost to it.

One of the fundamental purposes of marriage is that the spouses must live together and that one spouse is entitled to the society and comfort (comfort consortium). This is known as "two in one" relationship of the other.[24] Any one spouse leaving the other without just cause and excuse would be proceeded against by the other in a court of law praying for a decree of restitution of conjugal rights. In such an order it is required that the spouses must live together. The expression ''conjugal rights'' connotes two ideas: (1) right of the couple to have each other's society, and (2) the right to marital intercourse. One must note that this is the only positive relief under the HMA while other remedies[25] tend to weaken or disrupt marriage.

The section lays down that if one of the spouses, *without reasonable excuse, withdraws* from the *society* of the other, the aggrieved party may approach the court for restitution of its conjugal rights. A petition may be made to the District Court for the purpose. If the court is satisfied of the truth in the statements made in the petition it may grant a decree for restitution of conjugal rights. The Explanation attached to the section clarifies that when a question as to the existence of a reasonable excuse for withdrawal from the other person's society arises, the burden of proof to prove the same shall be on the person who has withdrawn from the society.

---

23. *Zafar Khan* v. *Board of Revenue*, 1984 Supp SCC 505: AIR 1985 SC 39; *see also* D.M. Walker: *The Oxford Companion to Law*, (1980), p. 1066.
24. This is a unique feature of conjugal relationship that husband and wife have both a right and a duty. See *Ela Dasu* v. *Ela Lachaman*, (1990) 2 HLR 249 (Ori); *Sushil Kumar* v. *Prem Kumar*, AIR 1976 Del 321: ILR (1976) 1 Del 665: 1976 Raj LR 487.
25. i.e. judicial separation (Section 10); nullity of marriage (Ss. 11 & 12); divorce (Ss. 13 and 13-B).

It has been observed by Ganesan J. in *Kanna* v. *Krishnaswami*,[26] the expression reasonable excuse cannot be reduced to a formula and would vary with time and the circumstances in each individual case. Further we have to see the conditions of the present day society and not those of *Manu* and other *Smriti* writers or the legendary Arundhatis. Reasonable excuse cannot be formulated in a straight-jacket yardstick.[27] It is an objective matter and not a subjective one. It is something more than a mere whim, fad or brainwave of a person. It must be just grave and weighty or grave and convincing cause.[28] Where there is no such reason the court would grant restitution.[29] The courts should apply the standard of a reasonable man here.

Before this section was amended in 1976, the scope of "reasonable excuse" was a restricted one. There was also no clarification as to the person on whom the burden would lie in respect of the proof of a reasonable cause. Courts differed on these points. In 1976, on modification of Section 9 [by the Marriage Laws (Amendment) Act, 1976] the scope of reasonable excuse was widened and the onus of burden of proof regarding reasonable excuse was placed on the respondent. This section when analysed lays down the following principles:

(1) It establishes, by implication, that the parties to every Hindu marriage are entitled to the society of each other;

(2) when one spouse deprives the other of this entitlement, it furnishes to the latter a legal remedy;

(3) the remedy which is well-defined can be granted only if all the statutory requirements are fulfilled.

(a) Society, conjugal society and matrimonial home:

Matrimonial home means the place where both husband and wife share the society of each other as life partners. But who can determine it, husband or wife?

"Conjugal society" and "matrimonial home" are interchangeable or synonymous expressions. In Section 9 the word "matrimonial home" is not used but the word society is used.

The term means company or companionship. The law expects every husband and wife not to withdraw from the society of the other, but there are two modes in which this company exhibits itself. For example, generally the husband and wife live together and part company only occasionally. The second mode of living is to live apart generally and to meet occasionally, of course not due to some dispute or discord but by mutual understanding according to their needs. Thus two styles of married life appear in our society, one is general, the other is exceptional. Dr Mahmood here raises a question that how does this fit in

---

26. AIR 1972 Mad 249: 84 Mad LJ 755; *Nigam* v. *Nigam*, 1971 All LJ 67; *Gurdeo Kaur* v. *Sarwan Singh*, AIR 1959 Punj 162: ILR 1959 Punj 509.
27. *Rita De Chowdhury* v. *Shri Kalyan De Chowdhury*, (2004) 1 HLR 14 (Cal DB).
28. *K. Kanthimathi* v. *S. Parmeshwara Iyer*, AIR 1974 Ker 124.
29. *Kakani Sujatha* v. *Kakani Lakshmaiah*, (2004) 2 HLR 505 (AP DB).

the concept of society?[30] He further adds that "this is the basic question. Once it is decided, much of the litigation relating to the remedy of restitution of conjugal rights will become meaningless. However the statute gives no clue as to what it means by the term 'Society' and the judges have, therefore, interpreted it according to their personal views regarding married life".[31]

(b) Withdrawal

It implies drawing back, departing from the normal, general mode or style of living and resorting to the exceptional style of living. Can one not say that the section would lose its relevance if the parties adhere to the exceptional mode of living and meet occasionally?

The traditional view is that the husband has the right to determine the matrimonial home. This is because of two reasons: (*i*) The husband is the bread-winner and (*ii*) he occupies a dominant position in law. But now the times are changed and women are gainfully employed. On account of service the wife may have to live at some place other than that of her husband. She may refuse to resign the job to live with her husband. Can this be called withdrawal from the society of the husband? Decisions in this regard are contradictory and confusing. The problem is required to be solved factfully by the courts. For example both are well-employed and earning. The husband wants to and is willing to maintain her at his place and is insisting that she resign her job, but she declines. Here comes the question of equality of sexes (Sections 21 & 25 of the Constitution). According to Section 18 HAMA, the husband has a duty to maintain his wife. But the wife has no such obligation. This implies that the husband gets the right to make the wife follow him. This situation is quite strange and if the wife prefers her employment she should be willing to accept the dissolution of marriage as its price. It may result in a breakdown of marriage.

Thus law on this point is not clear or satisfactory and requires to be looked into.

However, following the 1976 amendments it seems that both these views have been accepted by different courts.

In two cases — *Ratna Prabha case* and *Sukhvinder Kaur case*,[32] where the wife could not establish reasonable grounds for withdrawal on the plea of assault, cruelty, demand of cash or attempt to cause death of the newborn child; the husbands' petitions for restitution of conjugal rights were successful but in *Pramod Naik case*[33], the husband's petition was dismissed as the wife adduced the evidence that the husband demanded Rs 50,000 from her which her parents had no capacity to pay and she was consequently ill-treated and had to leave the

---

30. *Hindu Law*, p. 70.
31. *T. Sareetha* v. *T. Venkata Subbiaiah*, AIR 1983 AP 356.
32. *Ratna Prabha Das* v. *Dulal Shyam Chandra Choudhary*, AIR 2004 Jhar 24; *Sukhvinder Kaur* v. *Attar Singh*, AIR 2004 (P&H) 56 NOC.
33. *Pramod Naik* v. *Sukanti Naik*, AIR 2004 Ori 72.

house. "When the evidence stand on 'oath versus oath' the court is to appreciate the same by preponderance of probability".

A court executing a decree for restitution of conjugal rights is under no obligation or duty to attempt conciliation because execution proceedings are not proceedings under any section of the HMA. Hence Section 23 which enjoins upon the Court to try conciliation is not attracted.[34]

(c) Constitutionality of Section 9

In *T. Sareetha* v. *T. Venkata Subbaiah*[35] an interesting question arose as to the constitutionality of Section 9. The question was whether the remedy of restitution of conjugal rights violates the right to privacy guaranteed by Article 21 of the Constitution. T. Sareetha was a well-known South Indian film actress against whom her husband had applied for a decree of restitution of conjugal rights.

The High Court of Andhra Pradesh observed that:

> "A decree for restitution of conjugal rights constitutes the grossest form of violation of an individual's right to privacy. It denies the woman her free choice whether, when and how she is to become the vehicle for the procreation of another human being. A decree for restitution of conjugal rights deprives a woman of control over her choice as to when and by whom the various parts of her body are to be sensed."

The provisions of Section 9 are therefore unconstitutional being not only against Article 21 but also being violative of Article 14 of the Constitution (the right to equality). Though theoretically the remedy is available to both the parties, in practice it is resorted to almost exclusively by the husband against the wife.[36]

The Delhi High Court[37] holds a different view and observes that the section is constitutional. This controversy was set at rest by the Supreme Court in *Saroj Rani case*[38] wherein the judgment of the A.P. High Court was expressly overruled. Section 9 is not violative of the Constitution, said the Supreme Court. The section, the court said, serves a social purpose as an aid to the prevention of break up in a marriage. In case such an order is disobeyed the court has no

---

34. *Vijay Kumar* v. *Neelam Rani*, AIR 2004 Raj 256.
35. AIR 1983 AP 356.
36. *T. Sareetha* v. *T. Venkata Subbiaiah*, AIR 1983 AP 356. Remedy of restitution of conjugal rights has been abolished in England and it is argued that it should be abolished in India too. (See R.K. Agarwal: *Restitution of Conjugal Rights under Hindu law: A plea for the Abolition of the remedy*, (12(2) JILI (1970) 257; R.K. Agarwal: *Matrimonial Remedies under Hindu law*, (1974), pp. 25-28). But according to Professor Derrett in England this remedy has little practical utility, but in India it has a "considerable value" (see J.D.M. Derrett: *Introduction to Modern Hindu law*, (1963), p. 196; a critique of *Modern Hindu Law*, (1970), p. 292). The law Commission of India in its 59th Report, 1974, pp. 52-55, is silent on this point. It was therefore observed in Harvinder Kaur Case (below) by Avadh Bihari Rohtagi J. that abolition of the remedy of restitution of conjugal rights would be like throwing away the baby with the bath water.
37. *Harvinder Kaur* v. *Harmander Singh*, AIR 1984 Del 66.
38. *Saroj Rani* v. *Sudarshan Kumar Chadha*, (1984) 4 SCC 90: AIR 1984 SC 1562.

means to enforce a sexual intercourse between the spouses. But in such a situation the defaulting spouse's property (if it has any) can be attached. If the parties do not resume cohabitation for a period of one year or more as laid down in Section 13(1-A)(*i*) after such a decree, either party can obtain a divorce on that ground alone under this Act.[39]

The "legal grounds" for the rejection of an application under Section 9 are mentioned in Section 23 of this Act.[40] The petitioner under this section shall prove that:

(*i*) The respondent has withdrawn from the society of the petitioner,

(*ii*) Statements made by the petitioner in his application are true, and

(*iii*) There is no legal ground for the court to refuse the relief prayed for.

On proof of these three things, the burden will be shifted to the respondent to prove that there was a reasonable excuse for his or her withdrawal from the society of the petitioner.[41]

Lastly, to grant the relief prayed for is within the Court's discretion as the word "may" suggests.[42]

15. JUDICIAL SEPARATION [SECTION 10]

(a) General

Section 10 provides for judicial separation. It is a remedy lesser than divorce and it enables the spouses to live apart. When under certain circumstances it becomes difficult for one party to continue in the society of the other law allows separation. As a result of judicial separation active marital life between the spouses is suspended and the petitioning spouse's obligation to cohabit with the other is also suspended. On separation the marriage does not dissolve or sever but it subsists. The parties are absolved from the duty of cohabitation. They are not allowed to contract another alliance. During this period of judicial separation if either spouse indulges in adultery, it furnishes a good ground to the other for divorce.

To live separately under a homely settlement or because of a dispute between them due to circumstances beyond their control, does not amount to judicial separation.[43] Similarly, a Nyaya Panchayat, constituted under the U.P. Panchayat Raj Act, 1947 lacks jurisdiction to settlement matrimonial disputes and therefore filing a separation agreement before a Nyaya Panchayat does not

---

39. *See also* Section 23 and *Saroj Rani case* (supra).
40. *Gurcharan Singh* v. *Waryam Kaur*, AIR 1960 Punj 422.
41. *Manjula* v. *Zaverilal*, AIR 1975 Guj 158.
42. As held in *Haizaz Pashwa* v. *Gulzar Banu*, (2003) 2 HLR 106 (Ker), the wife's application for maintenance u/s. 125 CrPC cannot be rejected on the ground that as decree of restitution has been passed against her and she is refusing to comply with it. The wife's refusal may be because the decree against her was *ex parte* or she did not have sufficient means to contest. (See also *K. Narayan Rao* v. *Bhagyalakshmi*, (1984) Cri LJ 276 (Kant).
43. *Darshan Prasad* v. *Civil Judge II*, 1992 Supp (2) SCC 87: AIR 1992 SC 967.

bring about a judicial separation between husband and wife.[44] Divorce and judicial separation both are breaks in marriage but in nature they are different. A judicial separation is a jolt to a marriage, it does not dissolve the marriage; it is a warning bell or a safety value and provides an opportunity for reconciliation. Remedy given by the HMA is both prospective and retrospective and it is now more rational.

If the separated parties who live apart under a decree of judicial separation desire to make a compromise, there is no impediment whatsoever and the court may rescind such a decree of separation if it thinks it just to do. Thereafter the parties may resume their normal marital life without again undergoing a ceremony of marriage [Section 10(2)].

Under the Act a petition for divorce can be presented to the court on the ground that cohabitation has not been resumed for a period of one year or more after passing of the decree for judicial separation (*see* Section 13).

Section 10 does not provide any separate grounds for a decree of judicial separation. Its provisions are to be read with Section 13 (which provides grounds for divorce) and Section 13-A (which empowers the court to grant judicial separation where divorce is prayed for).[45]

The remedy of judicial separation is available in every case whether the marriage was solemnized before or after the commencement of this Act. The opening part of Section 10 makes this clear.

(b) Grounds for judicial separation

(*i*)	For husband or for wife	on any ground on which he or she can seek a divorce under Section 13(*i*) of the Act.
(*ii*)	For wife	Besides the above grounds she can have additional grounds available as mentioned in Section 13(2) of the Act.

Thus grounds for divorce have become grounds for judicial separation. (*See* Section 13 for details).

(c) Effect and rescission of decree

As observed by the Supreme Court in the case of *Hiranand S. Managaonkar*[46] a decree of judicial separation does not dissolve the bond of marriage but rather provides an opportunity to the spouses for reconciliation and readjustment. The facts of the case were that the respondent wife filed a petition for and obtained a decree of judicial separation against her husband, the appellant, on the ground of adultery. The court while passing the decree ordered the husband to pay maintenance to his wife (Rs 100 p.m.) and daughter (Rs 75

---

44. *Jeet Singh* v. *State of U.P.*, (1993) 1 SCC 325, affirming *Sarju Prasad* v. *IVth Addl. Distt. & Sessions Judge*, (1980) All LJ 515 (All).
45. *S.R. Adya* v. *Anuradha*, AIR 1980 Kant 8.
46. *Hiranand S. Managaonkar* v. *Sunanda*, (2001) 4 SCC 125: AIR 2001 SC 1285.

p.m.). The appellant did not pay even a single instalment. On the contrary he filed before the Court a petition for divorce under Section 13(1-A)(*i*) of the HM Act, 1955. He said therein that there had been no resumption of cohabitation between the parties for a period of more than one year after the date on which the decree for judicial separation was passed. His petition was dismissed by the Court on the ground that the appellant could not be allowed to take advantage of his own wrong. In appeal to the Supreme Court it was held that it would be wrong to infer that under Section 10(2) the petitioner has a vested right to a decree of divorce, even if he has made no attempt at reconciliation or has behaved in a manner to actively prevent it.

Such a decree of judicial separation may be rescinded, i.e. it is not final. Its effect is that certain marital rights and obligations are suspended and in their place rights and duties prescribed in the decree are substituted. Moreover, the view that matrimonial offence of adultery (of husband) would be deemed to be exhausted, once such a decree is passed, is not correct.

As mentioned above judicial separation does not snap the legal bond of marriage; it subsists. It gives a licence to the petitioner to live apart from the other spouse. As regards matters pertaining to the wife's right to maintenance, custody of children, they may be decided by the court while deciding the application for judicial separation or even at an earlier stage before disposal of the application.

Either spouse may apply for recession of a decree of judicial separation. Recission can be requested due to changed circumstances and the court must be satisfied about the truth of such statements so that it can find therefrom a "just and reasonable" cause to rescind the decree. If the decree is rescinded the petitioner can insist for cohabitation. However, as observed by the Mysore High Court,[47] if the parties cohabit the decree automatically becomes ineffective. Courts should use this power with great caution and circumspection.

[D]

NULLITY OF MARRIAGE AND DIVORCE

16. TEXT: SECTIONS 11, 12, 16, 17, 18

11. *Void marriages*.—Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (*i*), (*iv*) and (*v*) of Section 5.

12. *Voidable marriages*.—(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:

(*a*) that the marriage has not been consummated owing to the impotence of the respondent; or

(*b*) that the marriage is in contravention of the condition specified in clause (*ii*) of Section 5; or

47. *Kashawwa* v. *Phadeppa Sangappa*, AIR 1966 Mys 320.

(*c*) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner [was required under Section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978] the consent of such guardian was obtained by force [or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent]; or

(*d*) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage—

(*a*) on the ground specified in clause (*c*) of sub-section (1), shall be entertained if—

(*i*) the petition presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(*ii*) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(*b*) on the ground specified in clause (*d*) of sub-section (1) shall be entertained unless the court is satisfied—

(*i*) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(*ii*) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

(*iii*) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of [the said ground].

16. *Legitimacy of children of void and voidable marriages.*—(1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.]

17. *Punishment for bigamy.*—Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provisions of Sections 494 and 495 of the Indian Penal Code (45 of 1860) shall apply accordingly.

18. *Punishment for contravention of certain other conditions for a Hindu marriage.*—Every person who procures a marriage of himself or herself to be solemnized

under this Act in contravention of the conditions specified in clauses (*iii*), (*iv*) [and (*v*)] of Section 5 shall be punishable—

(*a*) in the case of a contravention of the condition specified in clause (*iii*) of Section 5, with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both;

(*b*) in the case of a contravention of the condition specified in clause (*iv*) or clause (*v*) of Section 5, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both [* * *].

17. VOID MARRIAGES [SECTION 11]

(a) General

A marriage, as said before, is a voluntary union of one man with one woman to the exclusion of all others. In this regard Section 5 lays down certain conditions for a valid marriage. Section 11 clearly lays down that any marriage solemnized after the commencement of this Act shall be null and void and may be declared so by a court, on presentation of a petition by either party against the other. If any one of the three conditions specified in clauses (*i*), (*iv*) and (*v*) is violated the court can pass a decree of nullity of marriage declaring it to be void.

(b) Marriages that are void

These three conditions referred to in the section are as follows:

(*i*) Neither party should have a spouse living at the time of marriage [Section 5(*i*)]. That is, a bigamous marriage is prohibited under Section 5.

(*ii*) The parties should not be within the degrees of prohibited relationship, unless their custom so permits. [Section 5(*iv*)]. That is, marriages hit by the rule of prohibited degrees which are penal under Sections 17 and 18.

(*iii*) The parties should not be Sapindas of each other, unless their custom permits such a marriage [Section 5(*v*)], i.e. marriages between Sapindas, void under Section 11.

Before the amendment this section did not have the words "against the other party" included, and consequently some courts granted decrees of nullity posthumously. However, after these words were inserted in the section such decrees could not be passed, i.e. after the death of one of the spouses no decree could be passed against that spouse. The words "against the other party" were added on the recommendation of the Law Commission of India in its Fifty-Ninth Report.[48] There was a suggestion that the words "on a petition presented by either party thereto" appearing in the section be deleted, but the same was rejected and the consequence is that no third person, whatever that person's relation may be with any one of the spouses, can present a petition and pray for a decree of nullity. The only reason, as Dr Mahmood observes, why the

48. (1974), p. 57.

doors of Section 11 are closed to third parties is that Section 11 provides a matrimonial remedy exclusively and not a general legal remedy. However its purpose is not to render all third parties absolutely remediless.[49]

The section has no retrospective effect. Marriages solemnised before the commencement of this Act are not brought within the ambit of this section. Such marriages are not void and hence cannot be annulled.

A marriage that is null and void is really no marriage at all; a marriage does not exist in such a case.[50] If therefore a marriage is void, there does not exist any marriage, then how can it be said to be a null and void marriage? It can be at the most said to be a void marital union. When a marriage is void a certificate of marriage is no authority for its validity.[51] It is *non est ab initio ipso jure*.[52]

(c) Declaration of nullity

Void marriages are wholly non-existent marriages, without any effect. It is therefore not obligatory for a spouse to obtain a decree of nullity. However such a decree is sought for the purpose of precaution or for record.

If one of the spouses is dead the other cannot seek a (posthumous) decree of nullity; because the death of one spouse does not validate the marriage. One should note that the fact of marriage is independent of whether a decree of nullity is sought for it or not.

A bigamous marriage is null and void, under this section. The second marriage must also be a valid one or else it is no marriage and in such a case it is not bigamy. A wife, in case of bigamy of her husband, cannot seek a decree of nullity of the second marriage under this section but she can file a civil suit for a declaration that the second marriage of her husband is void.

Children of bigamous marriages are governed by the provisions of Section 16 of this Act which speaks about the legitimacy of children of void and voidable marriages.

Marriages violating conditions (*ii*) and (*iii*) are also null and void, having no legal effect. They are also subjected to penal consequences (*see* Section 18).

(d) Interpretation of the section and application of Heydon's rule

The Supreme Court in *Reema Aggarwal's case*[53] has held that "the concept of marriage to constitute the relationship of "husband" and "wife" may require strict interpretation where claims for civil rights, right to property etc. may follow or flow, and a liberal approach and different perception cannot be an anathema. When the question of curbing a social evil is concerned."

---

49. *Hindu Law*, (1981), pp. 80, 82.
50. *Krishan* v. *Tulsani*, 1972 Punj LR 561.
51. *Saraswathi Amma* v. *Padmawati Amma*, (1992) 2 HLR 478 (Ker).
52. Non existent from the beginning.
53. *Reema Aggarwal* v. *Anupam*, (2004) 3 SCC 199.

In this case the respondent (the husband of the appellant) her mother-in-law and the brother-in-law forcibly put some acidic substance in the month of the appellant because she did not bring sufficient dowry.

The respondent, his father, mother and brother were charged under Section 498-A and 307 of the IPC.

It was pleaded by the accused that Section 498-A did not apply as the marriage between the appellant and Anupam was void because the latter had a wife living at the time, he married the appellant. Hence he could not be her husband as required by the provisions of Section 498-A. The accused were accordingly acquitted by the trial court. The High Court of Punjab and Haryana upheld the decision. The matter therefore came before the Supreme Court.

Arijit Pasayat J. of the Supreme Court held that the thrust of Sections 498 and 304-B is to meet the rampant evil of dowry deaths in society. The provisions of these sections require that they are interpreted with a certain element of realism too and not merely pedantically and hypertechnically.

A person who enters into a marital arrangement cannot be allowed to take shelter behind a smokescreen that the marriage was not valid[54] and therefore the question of dowry did not arise. It should be appropriate to construe the word "husband" to mean a person who enters into marital relationship and under the colour of such proclaimed or feigned status of husband, subjects the woman concerned to cruelty for a purpose enumerated in Sections 304-B and 498-A.

It must be remembered that in *Bhaurao Shankar Lokhande* v. *State of Maharashtra*,[55] and *Yamunabai Anantrao Adhav* v. *Anantrao Shivrao Adhav*,[56] the strict rule of "valid marriage" was adopted and this could not remove the mischief and misuse the word "husband" had created. To remove this kind cruelty of interpretation of the word the court in this case pressed into service the suppression of mischief rule as laid down in Heydon case.[57] The court also reiterated its decision is *Reserve Bank of India* v. *Peerless General Finance and Investment Co. Ltd.*,[58] and observed that:

> "Interpretation must depend on the text and the context. . . . . neither can be ignored. Both are important. That interpretation is best which

---

54. One cannot be allowed to take advantage of his own wrong.
55. AIR 1965 SC 1564.
56. (1988) 1 SCC 530.
57. (1584) 3 Co. Rep. 7a: 76 ER 637.

    The roots of interpretation of law lie in *Heydon's case*. Sometimes used with reference to the defect the object of which a statute was intended to remedy, it being said that the judicial function is to interpret the statute so as to suppress the mischief and advanced the remedy. For this purpose the following four things are required to be examined:

    (1) What was the provision before the statute was formed?
    (2) What was the mischievous element in the law?
    (3) What did Parliament do to remove it?
    (4) Know the real reason and apply the remedy to remove the mischief. See also *Gooris* v. *Scott*, (1874) LR 9 Exch 125.

58. (1987) 1 SCC 424.

makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted."[59]

In consequence the strict rule of "valid marriage" was interpreted and the culprits were brought to justice.

It has been held in *Laxmi Ammal* v. *Ramaswami Naicker*,[60] that Section 11 does not violate Article 14 of the Constitution by limiting the remedy to the parties to the marriage because it is based on "reasonable classification." This does not mean that a third party has no remedy is law because (*ubi jus ibi remedium*) where there is a right there is a remedy. *Rajeswara Reddy's case*[61] therefore rightly observes that though the first wife aggrieved by the second void marriage cannot petition to the court, yet under Section 9 of CPC and under Section 42 of the Specific Relief Act, she can obtain the declaration of the nullity of the second marriage. That is not barred by the HMA.[62] She can arrange to prosecute him under Sections 494 and 495 of the IPC read with Section 17 of the HMA.[63]

(e) Double bigamy and nullity decree

There may be cases where both the parties to the marriage home their spouses living at the time of their marriage. This is a case of double bigamy *Sumita* v. *Jugal Kishore*[64] was such a unique case. In this case the husband filed petition for the decree of nullity of marriage. There was no fraud nor misrepresentation but the court refused to grant the decree as it would amount to taking advantage of his own wrong.

(f) Death of one party and nullity decree

Before amendment of the HMA no such decree was given as it was believed to be a declaration of the status of a person which does not change on the death of the other party.[65] However the Supreme Court has held that such an application (before 1976 amendment) could be entertained at the instance of the party to the marriage even after the death of the other spouse. Its effect is to discover the flow in the marriage at the time of its performance.[66] After the amendment of Section 11 since such children are made legitimate, there could be no objection in refusing such a decree.

---

59. *Ibid.*, para 33.
60. AIR 1960 Mad 6: ILR 1959 Mad 634.
61. *Harmohan* v. *Kamla Kumari*, AIR 1979 Ori 51: 1979 MLR 280; *Surjit Singh* v. *Mahinder Pal Singh*, (1982) 2 HLR 122 (P&H).
62. *Ibid.*
63. *Sheelwati* v. *Ram Nandani*, AIR 1981 All 42.
64. (2005) 1 HLR 82 (P&H).
65. *Thulasi Ammal* v. *Gowri Ammal*, AIR 1964 Mad 118 (DB): ILR (1964) 1 Mad 65: (1964) 1 Mad LJ 228.
66. *Maharani Kusum Kumari* v. *Kusum Kumari Jadeja*, (1991) 1 SCC 582.

18. VOIDABLE MARRIAGES [SECTION 12]

(a) General

This section lays down four grounds on which a Hindu marriage becomes voidable, whether the marriage was solemnised before or after the commencement of this Act. The section is thus retrospective in its application.

An application by one of the spouses for a decree of nullity can be made to the court for the purpose of avoiding the marriage.

(b) Void and voidable marriage: Difference [Sections 11 and 12]

This difference can be summarised as under:

(*i*) A marriage which is void *ab initio* is a total nullity. A marriage is non-existent in such a case and does not affect or alter the status of the parties. Moreover, it does not create any rights and obligations of the parties, which normally result from a valid marriage.

On the other hand a voidable marriage remains valid and binding till avoided. It is and continues to be a valid marriage for all the purposes till a decree annulling it is passed under Section 12.

(*ii*) Parties to a void marriage are criminally liable; no penalty is laid down for a voidable marriage.

(*iii*) A void marriage is void *ab initio* and it can be held to be so without a formal declaration by a court under Section 11,[67] while for a voidable marriage, to put an end to it, annulment is necessary.

(*iv*) Section 11 applies to void marriages only contracted after the commencement of the Act whereas Section 12 applies to marriages contracted before or after the commencement of the Act. In brief, Section 11 is prospective, whereas Section 12 is retrospective.

(*v*) The remedy available under Section 12 is an optional remedy, i.e. the party concerned has to take the aid of a court for an annulment decree; in case of Section 11 the Act itself declares a marriage to be null and void without any action on the part of any spouse. Of course, nobody can stop a spouse from getting a declaration of nullity for the purpose of precaution and for the record. Children born out of void and voidable marriages are legitimate (Section 16).

19. GROUNDS FOR REMEDY OF ANNULMENT OF MARRIAGE UNDER SECTION 12

(*i*) The marriage has remained unconsummated; or

---

67. *Yamunabai A. Adhav* v. *Anantrao Shivram Adhav*, (1988) 1 SCC 530, 533: 1988 SCC (Cri) 182. See also *Shiva Kumar T.A.* v. *Pushpa Rekha*, (2002) 2 HLR 545 (Kant); *Bindu Sharma* v. *Ram Prakash Sharma*, AIR 1997 All 429. In *Paramasami Pillai* v. *Sarnathammal*, AIR 1969 Mad 124: (1969) 1 Mad LJ 197: ILR (1969) 1 Mad 758 it was held that a marriage with an impotent woman is voidable but if the man to whom she is married died without having got the marriage annulled, she will be regarded as his widow.

(*ii*) the marriage contravenes the condition laid down in Section 5, clause (*ii*); or

(*iii*) consent of the petitioner or his guardian is obtained by force or fraud; or

(*iv*) the respondent was pregnant at the time of marriage, i.e. pregnancy of the bride.

Out of the various grounds mentioned above numbers one and four are available only to the party who is aggrieved, number two is available to either party and number four is available to the party aggrieved or to the guardian in marriage, as the case may be.

(a) First ground: Impotency [Section 12(1)(a)]

As Section 12(1)(*a*) runs, it may be dissected and represented as under:

(*i*) that the marriage has not been consummated; and

(*ii*) that the non-consummation is due to the impotence of the respondent.

This is irrespective of the fact whether the respondent was impotent before the marriage or becomes so at the time of, or at any time after, the marriage. Consequently the time of occurrence of impotence is immaterial.

This analysis therefore indicates two important points which must be cleared, and they are:

(*a*) What is "consummation", and

(*b*) what is "impotence".

(*i*) ***What is consummation and impotence.***—Consummation of marriage means full and normal sexual intercourse between married persons after their marriage, irrespective of whether conception is effected or precluded, or is impossible for any reason.[68]

Impotency is the inability to have complete normal sexual intercourse. It may arise from a physical defect in either partner, or from a psychological barrier amounting to invincible repugnance on the part of one to sexual relations with that partner. Sterility is irrelevant and does not imply impotency.[69] The following rulings on the meaning and nature of consummation and impotency are relevant since they throw light in explaining the meaning.

Consummation means full and complete coitus. Imperfect attempts do not amount to consummation.[70] Sterility is different from impotency and a sterile person is not necessarily impotent.[71] Physical and/or mental condition of a person also plays an important part, so much so, that if a person's physical or mental condition is such as to make consummation of marriage practically

---

68. Walker: *Oxford Companion to Law*, (1980), p. 282.
69. *Ibid.*, p. 603.
70. *Chanchal* v. *Kewal*, AIR 1972 P&H 474; *Jagdish* v. *Shyama*, AIR 1966 All 150; *Rangaswami* v. *Arvind*, AIR 1957 Mad 243.
71. *Laxmi* v. *Babulal*, AIR 1973 Raj 39; *Shewanti* v. *Bhaurav*, AIR 1971 MP 168.

impossible that person is impotent.[72] The impotence or imbecility (incapacity to coitus) whether physical or mental need not be general; it should be specific with reference to or towards his or her spouse only.[73]

In *Elizabeth case*[74], on the ground of the impotency of the husband a divorce petition was filed by the wife. It was proved that the spouses had slept together for four nights and thereafter lived together for four months but the husband *could not* have sexual intercourse with his wife. This, the court said, led to the inference that the husband was impotent. It was, now, on the husband to rebut such an inference.

Absence of uterus (womb) in the body of one's female partner, however, does not amount to impotency[75] but absence of vagina[76] or the absence of a proper vagina would mean impotency. Similar by organic malformation making a woman sexless would mean impotency.[77] As observed by the Delhi High Court[78] even one single act of coitus after the marriage kills the remedy. If after consummation of the marriage either party becomes impotent, provisions of Section 12 have no application. Invincible repugnance to coitus, or hysteria caused by strong hatred or fear for coitus may be regarded, observe the M.P. and Punjab High Court,[79] as impotency. If a husband fails to satisfy his wife's abnormal appetite for sex that cannot be regarded as impotency.[80] "Potence" included discharge of healthy semen-containing living spermatozoa in the case of men and "discharge of menses" in the case of women.[81]

Consumation may be proved by medical evidence.[82] In suitable matrimonial cases a court can appoint a commissioner — doctor for examining a party to marriage to know whether he or she is impotent or not or is able to consummate the marriage. And this does not violate Article 21 of the Constitution, i.e. there is no deprivation of personal liberty of a party.

For a decree of nullity the impotency should continue until institution of proceedings.[83]

(ii) Proof.—Impotence has to be proved, it cannot be assumed.[84] However, in the instant case after the first night of marriage during seven years there was a

---

72. *Digvijay Singhji* v. *Pratap Kumari*, (1969) 2 SCC 279, 281: AIR 1970 SC 137.
73. *Bawi* v. *Nath*, AIR 1970 J&K 130; *Jagdish* v. *Shyama*, AIR 1966 All 150; *Shantabai* v. *Tarachand*, AIR 1966 MP 8.
74. *Elizabeth* v. *Stanley*, AIR 1985 AP 238.
75. *Samar Sen* v. *Sadhana*, AIR 1975 Cal 413.
76. "Vagina" means "a canal that leads from the uterus to the external orifice of the genital canal".
77. *Laxmi* v. *Babulal*, AIR 1973 Raj 39; *Paramsami* v. *Sarnath*, AIR 1969 Mad 124.
78. *Rita* v. *Nijhavan*, AIR 1973 Del 200.
79. *Shantabai* v. *Tarachand*, AIR 1966 MP 8; *Jagdish* v. *Sita*, AIR 1963 Punj 114.
80. *Rajendra Kapoor* v. *Man Mohan*, AIR 1972 P&H 142.
81. *Gudivada Venkateswararao* v. *Smt Gudiwada Nagamani*, AIR 1962 AP 151.
82. *Gurmeet Kaur* v. *Narinder Singh*, 1978 MLR 380 (P&H): 1978 HLR 521.
83. *Digvijay Sinhji* v. *Pratap Kumari*, (1969) 2 SCC 279, 281: AIR 1970 SC 137.
84. *Brij Vallabha* v. *Sumitra*, AIR 1975 Raj 125.

little intercourse between the spouses. The husband was prosecuting his studies but it was not due to this reason, it was because he was not physically capable of it. The wife petitioned for annulment of marriage on grounds of impotency of the husband. The respondent did not appear in the court. He was also not ready and willing to go through a medical check-up. The court consequently accepted the petitioner's submissions and annulled their marriage.[85]

It must be noted that after the Amendment Act of 1976 it is not necessary to prove that the husband was fully impotent.[86]

The burden of proof lies on the petitioner but when once the impotency is proved there is a rebuttable presumption in favour of its continuance.[87] The respondent, however, cannot be compelled to submit to a medical check-up. After a petition for nullity of marriage if there is proof of consummation, the petition is liable to be dismissed.

When a petition I-s filed by a wife and she is proved to be a virgin, that will establish the husband's relative impotence, despite medical evidence of his general potence.[88]

Impotency is different from inability to beget a child due to operation of vasectomy or tubectomy. If such an operation, however, causes impotence, evidence to that effect may be led to obtain relief under Section 12(1)(*a*).

It must be remembered that only the party aggrieved can seek this relief, no third person can do so.

(b) Second ground: Unsoundness of mind, mental disorder and recurrent attacks of insanity and epilepsy [Section 12(1)(*b*)]

Section 5(*ii*) prescribes that neither-party to a marriage is incapable of giving a valid consent to it (*a*) in consequence of unsoundness of mind; or (*b*) though capable of giving a valid consent has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or has been subject to recurrent attacks of insanity or epilepsy.

If such a condition did not exist at the time of the marriage but is developed after marriage, the provisions of this section would not apply, but other remedies under the Act[89] would be available. The grounds under Section 12(1)(*b*) are available to both the parties to a marriage. This provision as amended by the 1976 Amendment Act has widened its scope so as to embrace a large area of application. A very strict standard of proof in this regard is required.[90]

---

85. *Suvarnabahen* v. *Rashmikant*, AIR 1970 Guj 43.
86. *Suvarna* v. *G.M. Acharya*, AIR 1979 AP 169.
87. *S.* v. *R.*, AIR 1968 Del 79.
88. *Jagdish* v. *Shyama*, AIR 1966 All 150.
89. *See* Sections 10, 13, 13-A.
90. *R. Laxmi Narayan* v. *Santhi*, (2001) 4 SCC 688.

(c) Third ground: Consent obtained by force or fraud [Section 12(1)(*c*)]

Absence of free consent makes a marriage voidable. The consent of the petitioner or the guardian should not have been obtained by force or by fraud "as to the nature of the ceremony or as to any material fact or circumstance concerning the marriage". The phrase, appearing in the above lines, in inverted comas, which was substituted by the 1976 Amendment Act, has limited the meaning of the word fraud, it must be noted.

The word "force" is not defined by the Act. But it may include all cases of compulsion, coercion or duress. Abduction, terror, coercion and threat to commit suicide will definitely be covered by the term force, as the Calcutta High Court observed.[91]

In *Balbir Kaur*[92] a material physical deformity of the wife (i.e. her left hand was partially disabled due to polio in childhood) was concealed from the husband and his family before the marriage. This amounted to fraud insofar as the husband's consent was concerned. He was therefore entitled to a decree of nullity of marriage.

Caste-consciousness of the spouse (in a case where a lower caste girl is married to a Brahmin boy) and concealment of a serious premarital affair before the other spouse should also be considered as fraud within the meaning of this sub-section as it affects the material fact or circumstance concerning the respondent.

The remedy under this section is available only for a period of one year from the date of discovery of the fraud and in the case of force one year from the date on which the force ceased to operate. It is lost after this period.

(d) Fourth ground: Pregnancy of the bride [Section 12(1)(*d*)]

(*a*) That the respondent was at the time of the marriage pregnant by some person other than the petitioner, is the fourth ground. The basis of this ground is what is called *suppressio veri* by the woman (the respondent).

Sub-section (1)(*d*) is to be read with sub-section (2)(*b*) which lays down three further conditions which are to be satisfied in order to avail of the remedy under sub-section (1)(*d*).

They are—

(*b*) that at the time of the marriage the petitioner was ignorant of the facts alleged;

(*c*) that the petitioner has started proceedings under Section 12 within one year of the marriage; and

(*d*) that the petitioner did not have, with his consent, marital intercourse with his wife ever since he discovered that the wife was pregnant by some other person.

---

91. *Purbi* v. *Basudeb*, AIR 1969 Cal 293.
92. *Balbir Kaur* v. *Maghar Singh*, AIR 1984 P&H 417.

Thus the pregnancy of the wife, ignorance of this fact by the groom, the starting of proceedings by the groom within one year of the marriage and absence of marital intercourse by the petitioner-husband with his wife since such discovery — are the grounds or conditions to avail of the remedy under Section 12(1)(*d*).

If the girl becomes pregnant by some person before her marriage and subsequently the same fellow marries her the section has no application and there is no *suppressio veri*. But if the person marrying her is some third person, the marriage is voidable at the option of the groom. There are many possibilities between premarital intercourse/pregnancy and subsequent marriage and it all depends upon circumstances whether the section applies or not. The bride may become pregnant after marriage by some person other than her husband, here the section has no relevance.

As held by the Supreme Court[93] under this clause [sub-section(1)(*d*) read with sub-section (2)(*b*)] the groom had to establish such facts and circumstances as would lead the court either to believe that the respondent was pregnant by someone else at the time of the marriage, or, to hold that a prudent man under the circumstances and on the facts of the case, would be completely satisfied that it was so.

Onus of proof lies on the petitioner-husband to prove this.[94] A period of one year for institution of proceedings is a condition precedent of an absolute nature and not a period of limitation which may be extended on general principles of the law of limitation. The husband has also to prove that he did not cause this premarital pregnancy.[95]

In *Nishit* v. *Anjali*[96] where a bride gave birth to a mature child within 167 days from the date of marriage, it was held-that it was for the wife to raise a reasonable doubt that she was pregnant by the person who became her husband.

A blood test for the ascertainment of the child's paternity is also possible. If the wife volunteers for the same, well and good, but it cannot be forced upon her.[97]

[E]

DIVORCE

20. TEXT: SECTIONS 13 TO 15

13. *Divorce.*—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

[(*i*) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

---

93. *Mahendra Nanavati* v. *Sushila Nanavati*, AIR 1965 SC 364.
94. *Nandkishore* v. *Munnibai*, AIR 1979 MP 45.
95. *Mahendra Nanavati* v. *Sushila Nanavati*, AIR 1965 SC 364.
96. AIR 1968 Cal 105.
97. *Ibid.*

(*i-a*) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(*i-b*) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]

(*ii*) has ceased to be a Hindu by conversion to another religion; or

(*iii*) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.—In this clause,—

(*a*) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(*b*) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or]

(*iv*) has, [* * *] been suffering from a virulent and incurable form of leprosy; or

(*v*) has, [* * *] been suffering from venereal disease in a communicable form; or

(*vi*) has renounced the world by entering any religious order; or

(*vii*) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive; [* * *]

[*Explanation.*—In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.]

(*viii*) [* * *]

(*ix*) [* * *]

[(1-A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground—

(*i*) that there has been no resumption of cohabitation as between the parties to the marriage for a period of [one year] or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(*ii*) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of [one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.]

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,—

(*i*) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition; or)

(*ii*) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or [bestiality; or]

[(*iii*) that in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under Section 125 of the Code of Criminal Procedure, 1973 (2 of 1974), [or under the corresponding Section 488 of the Code of Criminal Procedure, 1898 (5 of 1898)], a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

(*iv*) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation.—This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).

[13-A. *Alternate relief in divorce proceedings*.—In any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in clauses (*ii*), (*vi*) and (*vii*) of sub-section (1) of Section 13, the court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation.]

13-B. *Divorce by mutual consent*.—(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.]

14. *No petition for divorce to be presented within one year of marriage*.—(1) Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of divorce, [unless at the date of the presentation of the petition one year has elapsed] since the date of the marriage:

Provided that the Court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented [before one year has elapsed] since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but if it appears to the Court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the [expiry of one year] from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the [expiration of the said one year] upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce before the [expiration of one year] from the date of the marriage, the Court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the [said one year].

15. *Divorced persons when may marry again.*—When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal the time for appealing has expired without an appeal having been presented or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again.

[* * *]

(a) General

Under the general uncodified Hindu law divorce was not recognised; it was rather unknown to the old textual Hindu law of marriage. The reason is very simple that a marriage was an indissoluble tie between the husband and the wife. Divorce was thus not recognised unless it was allowed by custom. Section 13 therefore introduces a vital and dynamic change in the marriage law of Hindus. One may call it a revolution in Hindu law.[1]

The primary objective of the Hindu Marriage Act is to preserve and protect a Hindu marriage, rather than allow it to disintegrate. Severance of marriage, is therefore to be permitted only on substantial grounds. Now, since the amendment, the right to divorce has become more or less a statutory right subject to any right recognised by custom.[2] Divorce, according to Section 14, will not ordinarily be granted within one year of the marriage. Even where a ground for divorce is made the court will have to satisfy itself (*i*) that the petitioner is not seeking to take advantage of his own wrong or disability. (*ii*) where the petition is founded on adultery, the petitioner has not in any manner connived at or condoned the act or acts complained of, (*iii*) that the petition is not the result of any collusion between the spouses or its presentation is not marked by any unnecessary or improper delay, and (*iv*) that there is no other legal ground against granting the relief prayed for.[3] One cannot add to any grounds mentioned in Section 13 on the strength of one's own notions about the interest of the parties or society.[4] As observed by the Allahabad High Court[5] severing all connections with one's wife and permitting her to remarry any person of her choice is no divorce; divorce has to be obtained through a competent court. A decree of divorce is subject to the mandatory provisions contained in Section 15.

Section 13 is retrospective as well as prospective in operation. Section 13 provides the circumstances wherein the right to divorce accrues while Section 14 limits this right by laying down a "one-year limit" of time. In cases of exceptional hardship to the petitioner or exceptional depravity on the part of the respondent a petition for divorce may be allowed to be made even though there

---

1. Provisions regarding divorce have been twice amended (*i*) by the HM (Amendment) Act, 1974 and (*ii*) by the Marriage Laws (Amendment) Act, 1976. They stand amended now beyond recognition both in form and in substance.
2. *See* S. 29(2).
3. *See* Section 23(1)(*a*) to (*c*).
4. *Dwarka Bai* v. *Nainan Mathews*, AIR 1953 Mad 792.
5. *Ishwar Singh* v. *Hukam Kumar*, AIR 1965 All 464.

is a time limit. It all depends upon the discretion of the court. Section 15 explains when divorced persons may marry again.

(b) Analysis of the section[6] [Section 13]

When carefully analysed the section shows that there are in all fifteen grounds for divorce. If we classify these grounds they fall into the following three divisions:

(*i*) *Nine grounds* based on "*fault-liability theory*" of divorce. These grounds are laid down in sub-section (1) and only the party aggrieved may avail of them.

(*ii*) *Two grounds* based on "*breakdown theory*" of divorce which are contained in sub-section (1-A). They may be availed of by any party to the marriage who is aggrieved or who is guilty.

(*iii*) *Four grounds* which are *special* and which can be availed of by a wife only. These are shown in sub-section (2).

Grounds shown above in (*i*) and (*ii*) are available in every case of marriage, whenever solemnized.

Looking from another angle, as per sub-section (1) and (1A), there are eleven common or general grounds on which both parties to a marriage can obtain divorce. The grounds available to the wife exclusively in addition to the general grounds are four as mentioned in sub-section (2).

(c) Summary of the grounds

These fifteen grounds of divorce available to husband and wife and to wife only may be succinctly laid down as under: -

1. Adultery [Section 13(1)(*i*)]
2. Cruelty [Section 13(1)(*i-a*)]
3. Desertion [Section 13(1)(*i-b*)
4. Conversion [Section 13(1)(*ii*)]
5. Insanity or mental disorder [Section 13(1)(*iii*)]
6. Leprosy [Section 13(1)(*iv*)]
7. Veneral disease [Section 13(1)(*v*)]
8. Renouncing the world [Section 13(1)(*vi*)]
9. Unheard of for seven years or more [Section 13(1)(*vii*)]
10. Judicial separation decreed [Section 13 (1-A)(*i*)]
11. Non-Restitution of Conjugal Rights [Section 13(1-A)(*ii*)]
12. Bigamy [Section 13(2)(*i*)]

---

6. T. Mahmood: *Hindu Law*, (1981), p. 100.

13. Rape, sodomy, bestiality [Section 13(2)(*ii*)]
14. Maintenance decreed to wife [Section 13(2)(*iii*)]
15. Repudiation of marriage by wife before she is 18 years of age [Section 13(2)(*iv*)]

Out of these grounds numbers 1 to 11 are available to both husband and wife and the remaining four (12, 13, 14 and 15) are available only to the wife.

It must be noted that these grounds of divorce though liberalised are an exception to the general principle favouring the continuation of marital ties. Though they may be liberally construed by courts, new grounds of divorce cannot be added by courts.

As observed by the Supreme Court of India in *Reynold Rajamani case*[7] if divorce law is to be meaningful in freeing the parties from the bond of marriage which has failed, it must provide for economic independence of the divorced woman irrespective of her blameworthiness in bringing about such a state of affairs.

A question may arise whether divorce may be granted on a ground which has no place in HMA.[8] For example under the Special Marriage Act, 1954, the Parsi Marriage and Divorce Act, 1936 and Dissolution of Muslim Marriage Act, 1939 divorce may be granted if the respondent is undergoing a sentence of imprisonment for seven years or more for an offence as defined in IPC.[9] The HMA does not recognise it as a ground for divorce[10] to obtain divorce under HMA, there must be a ground recognised by the legislature. And suppose if one of the parties to a marriage wants divorce on the ground that the marriage has broken down irretrievably. Here also the point is controversial. To remedy these problems the Law Commission of India has recommended that irretrievable breakdown of marriage should be made a ground of divorce by the Legislature. What is the purpose of keeping alive de jure that which is dead de facto? The Supreme Court recently in *Navin Kohli Case*,[11] reiterated its recommendations quite forcefully.

(d) Adultery

Adultery is extramarital sex. It is consensual sexual intercourse between a married person and a person of the opposite sex not being the other spouse, during the subsistence of the former's marriage.[12]

Before the amendment in the law, the petitioner, in order to obtain divorce on this ground, had to prove that the other party *was living in adultery* which would cover more or less continuous and habitual course of action; an isolated

---

7. *Reynold Rajamani* v. *Union of India*, (1982) 2 SCC 474.
8. *Dipak Kumar Sarkar* v. *Sima Sarkar*, (2005) 1 HLR 730 (Cal DB).
9. SMA S. 27(*c*); PM & DA S. 30(*f*); DMMA S. 2(*iii*).
10. *Jorden Diengdeh* v. *S.S. Chopra*, (1985) 3 SCC 62, para 3.
11. *Naveen Kohli* v. *Neelu Kohli*, (2006) 4 SCC 558: (2006) 1 HLR 497.
12. *Henderson* v. *Henderson*, AIR 1970 Mad 104.

act of immorality was not sufficient. But now, after the 1976 amendment, under the changed language of the sub-section even a single and isolated act of infidelity would be a sufficient ground to obtain divorce.

Proof of adultery by direct evidence is rare and is not necessary. It would be unreasonable to expect direct evidence of adultery.[13] Moreover the nature of this act is such that expecting direct evidence is not only unreasonable but also not possible.[14] Courts therefore expect circumstantial evidence.[15] Besides, the time and place of adultery need not be proved.[16] In essence one can say that the degree of proof need not reach certainty but it must carry a high degree of probability.[17] As observed by the Calcutta High Court in *Sachindranath case*[18] the evidence in this respect may take the form of non-access and the birth of children, contracting venereal disease, evidence of visits to houses of women of easy virtue, confessions and admissions of the spouses. The petitioner has to prove by such evidence not only an opportunity to commit adultery but also that the same was committed.

An attempt to commit adultery, however, does not amount to adultery. Mere love letters cannot establish the guilt of extramarital sex.[19] The words "voluntary sexual intercourse" used in the sub-clause indicate that if there is an involuntary sexual act with a person other than his spouse or her spouse, the section is not attracted, it seems.

Where a petition is presented on the ground of adultery, the adulterer must be impleaded as a co-respondent.[20]

Cases

Where a married man contracts a bigamous marriage after the commencement of the Act his first wife can file a petition for divorce under this provision. This is because the second marriage is void and its consummation amounts to extramarital sex. This exactly happened in the case of (*Dr*) *Jatindra Nath*[21] wherein the husband after marriage went abroad for studies leaving his two minor daughters and his wife in India. He did not manage to bring his wife with him and left her. For 23 years they lived apart and the husband contracted a

---

13. *Pushpa Devi* v. *Radhey Shyam*, AIR 1972 Raj 360: 1972 Raj LN 561.
14. *Patayee Ammal* v. *Manickam*, AIR 1967 Mad 254.
15. *Rajendra Agarwal* v. *Sharda Devi*, (1994) 1 HLR 1 (MP); *Hargovind Soni* v. *Ramdulari*, (1986) 2 HLR 1 (MP); *J.G. Waghela* v. *P.M. Vaghela*, (1986) 1 HLR 93 (Guj). In *H.T. Veera Reddi* v. *Kistamma*, AIR 1969 Mad 235: (1969) Mad LJ 366. The Court held that the birth of a child after 402 days of separation from the husband is a clear evidence of adultery, because no child can be born of the lien of the husband after so long a separation. See also *Imarta Devi* v. *Deep Chand*, (2004) 1 HLR 387.
16. *Barker* v. *Barker*, AIR 1955 Mad 103.
17. *Baby Ammal* v. *Varadarajulu*, (1969) 82 Mad LW 18; *Miller* v. *Minister of Pensions*, (1947) 2 All ER 372.
18. *Sachindranath* v. *Nilima Chatterjee*, AIR 1970 Cal 38.
19. *Chandra Mohini* v. *Avinash*, AIR 1967 SC 581.
20. *M. Mallika* v. *M. Raju*, (2005) 2 HLR 364 (Mad); *Arun Kumar Agarwal* v. *Radha Arun*, (2004) 1 HLR 474 (Kant DB).
21. *Veena Kalia* v. *Jatinder Nath Kalia*, AIR 1996 Del 54.

second marriage there. He had three children out of the second marriage. He was thus guilty of cruelty, desertion and adultery. The wife got divorce on these grounds and the husband was ordered to pay her maintenance of Rs 10,000 per month. The court also ordered him to deposit Rs 10 lacs in the court towards the expenses of his daughters' marriages.

The Chennai High Court set aside an order of the lower court wherein on the allegation of adultery of the wife divorce was sought. The court held that mere allegations by the husband without details were not sufficient to prove adultery. The husband alleged that on three occasions he saw his wife talking with other persons. No physical contact was alleged and all this happened during the daytime when all the three grown-up children of the petitioner were present in the house. Evidence disclosed that the said other person was more or less treated as a member of that family. Even the witnesses did not speak of suspicious circumstances. After the Panchayat was conducted the wife was living separately. Moreover the husband permitted his two grown-up daughters to live with his wife. This itself belied the allegations of adulterous life on part of the wife. Since the order of divorce, the High Court held, was based on assumptions and surmises it was liable to be set aside.[22] It has been observed by the court that adultery of the wife does not deprive her of her right to get divorce on the ground of cruelty of the husband.[23]

Valsarajan v. *Saraswathy*

Regarding adultery a question has been posed by the critique of *Valsarajan* v. *Saraswathy*,[24] a case decided by the Karnataka High Court. The question is whether adultery is a ground for divorce and a way to maintenance.[25]

Facts of the case: the petitioner *V* married the respondent *S* in April 1987. A child was born to them. Their marriage was however dissolved in October 1997 as the wife was living in adultery. An application for maintenance was filed during the pendency of divorce proceedings by the respondent under Section 125 CrPC. On the ground that the wife was living in adultery. The application was dismissed as she was living in adultery.

After dissolution of the marriage, the respondent *S* filed a fresh application for maintenance in the capacity of "a divorced woman" incapable of maintaining herself as she was a wife under the explanation (*b*) to Section 125(1) CrPC. The petitioner resisted it on two grounds:

> (*a*) that her earlier similar application was dismissed and (*b*) since the respondent was living in adultery, she was not entitled to maintenance in view of the provisions of Section 125(4) of the CrPC. The family court rejected both the objections and allowed the application. Family Court's order was challenged, but the H.C. dismissed the revision application.

---

22. *Rajee* v. *Baburao*, AIR 1996 Mad 262.
23. *Uttam Soni* v. *Kiran Soni*, (2005) 2 HLR 439 MP.
24. (2003) 2 KLT 548.
25. Raman Mittal: *Adultery: A Ground for Divorce and a way to Maintenance?*

The reason is that in the present case the earlier application was on one state of facts and the second application was based on a different state of facts. Her first application was filed as the petitioner's *wife*, but the second one was filed as his *divorced wife*.[26] In order to fortify its arguments the court pressed into service Supreme Court's decision in *Rohtash Singh*.[27] According to this decision,

> "[A] woman has two distinct rights for maintenance. As a wife, she is entitled to maintenance unless she suffers from any of the disabilities indicated in Section 125(4). In another capacity, namely, as a divorced woman, she is again entitled to claim maintenance from the person of whom she was once a wife. A woman after divorce becomes a destitute. If she cannot maintain herself, or remains unmarried, the man who was, once, her husband continues to be under a statutory duty and obligation to provide maintenance to her."

Now Section 125(1)(*a*) speaks of a wife unable to maintain herself. Explanation (*b*) to Section 125(1) speaks that "wife" includes a woman who has been divorced by or has obtained divorce from her husband and has not remarried. One should note that the section talks only about the rights of a wife to receive maintenance at one place and in one go. Explanation (*b*) to Section 125(1) widens the ambit of the expression wife which includes "divorced woman", but the section nowhere talks about the *rights of a divorced woman* separately. So the understanding of the Courts[28] that a woman has two distinct rights of maintenance under Section 125 CrPC, one as a "wife" and the other as a "divorced wife", is an instance of erroneous interpretation of the statute. In other words the rights of a "divorced woman" are subsumed in the rights of a "wife" the "wife" is a bigger circle and "divorced woman" is a smaller circle within that bigger circle. Logically, the smaller circle or the sub-set can never break through and go beyond the bigger circle. The part cannot be bigger than the whole. So the rights which are not available to the "wife" can never be made available to the "divorced woman". *Making a right available to a "divorced woman" which was not available to her as a "wife" is an error in logic as well as law.*

A question may be posed, that, can there be an enhancement in rights of a divorced woman over and above those which were available to the wife during the subsistence of marriage? Surveying the entire gamut of family law which includes the vast Hindu and Muslim jurisprudence, there could be found none worth the name that emanates or accrues to a divorced woman which was not available to her during the subsistence to marriage. In fact the institution of marriage entails various rights on the wife and corresponding obligations on the husband and the rights get diminished, curtailed and truncated to a great extent

---

26. Section 125 CrPC uses the expression "divorced woman".
27. *Rohtash Singh* v. *Ramendri*, (2000) 3 SCC 180.
28. *Ibid.*, see also *Valsarajan* v. *Saraswathy*, (2003) 2 KLT 548.

upon divorce. Logically, the rights of a divorced woman is a sub-set of the rights of a wife.

Court's finding that a woman has two distinct rights of maintenance, one as a "wife" and another as a "divorced wife" will amount to accrual of fresh rights to a divorced woman, which is bad in family jurisprudence.[29]

Another important issue involved in this case for consideration of the court was, — whether the respondent was entitled to get maintenance in view of the provisions contained in Section 125(4) of the CrPC? The section says that no wife shall be entitled to receive an allowance from her husband if she is living in adultery, or if, without any sufficient reason she refuses to live with her husband or if they are living separately by mutual consent. In this case the court, after examining the wife's conduct stated, "A divorced can never live in adultery."

This statement of the court is quite dangerous. In this context Dr. K.N. Chandrasekharan Pillai[30] in his article[31] puts forward the following argument:

> "Clearly adultery is a matrimonial offence and so it cannot be committed by a woman who is not a wife. Likewise it could be argued that the term "wife" cannot in ordinary parlance, include a divorced woman" But the Legislature has chosen to achieve its aim by enacting an inclusive definition for the term "wife" which comprehends even a divorced woman. It so consequently it could be argued, that the term "adultery" should also take its meaning from the context. It could include promiscuity as well for the purpose of Section 125(4) and 125(5)."[32]

One has to note that the offence of adultery is defined in relation to the husband. In this case[33] the petition is legally declared to be not her husband and she also ceases to the wife *dehors* the explanation. Just as a woman falling in this category cannot be expected to live with the erstwhile husband, she cannot be expected to be faithful to the erstwhile husband.

The paradise of maintenance, once lost during subsistence of marriage, cannot be regained upon divorce. The error of interpretation by many a court[34] have created terrors in the minds of harassed husbands.[35]

In *Rohtash Singh case*[36] the Supreme Court cited *R.C. Kaushal*[37] and observed that this provision is a measure of social justice and specially enacted

---

29. 46 JILI (2004) 421.
30. Editor Journal of the Indian Law Institute and Director, Indian Law Institute, New Delhi.
31. "Maintenance to a Divorced wife under S. 125 CrPC 1973" 2 ACLR (1978) 347 at 353.
32. See *Vanamala* v. *Ranganatha Bhatta*, (1995) 2 KLT 397. (Petition by a divorced wife u/s 125(4) resisted, because divorce was by mutual consent. It was held that sub-section (4) does not apply to the case of a woman who has been divorced, or who has obtained a decree for divorce "wife" in the sub-section does not have the extended meaning of including a woman who has been divorced.
33. *Vanamala case* (ante).
34. *Valsarajan case* (ante); *Rohtash Singh* (ante); *Vanamala* (ante).
35. Prof. Kusum: "Harassed husbands".
36. (2000) 3 SCC 180.
37. *R.C Kaushal* v. *Veena Kaushal*, (1978) 4 SCC 70: AIR 1978 SC 1807. See also *Yamunabai Anantrao Adhav* v. *Anantrao Shivram Adhav*, (1988) 1 SCC 530.

to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. We have no doubt but sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions of fulfil. The brooding presence of the constitutional empathy for the weaker section like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause — The cause of the derelicts.

Social scientist and lawyers must understand "gender sensitivity". They cannot and should not produce and nurture "gender biases" which continue to shadow the vision of the courts in India.

The impact of the decision of this ilk may be examined. If a recalcitrant wife who was divorced on the ground of her infidelity wants to take revenge upon the erstwhile husband, she can continue to live in adultery with her paramour under the nose of the former husband and compel him to maintain her even if saddled with the burden of maintaining of his second wife and children. Could we attribute such an intention to the legislature? An unfaithful woman (living in adultery) breaks the very basis of marriage. It is the "legally wedded wife" that determines eligibility for maintenance. Such decisions therefore should be set aside at the earliest.[38]

As observed by the Supreme Court,[39] in construing the provisions of Section 13 one has to remember that divorce is not generally favoured or encouraged by courts and is permitted only for very serious and grave reasons. This will become obvious if the provisions of Section 13 are compared with the corresponding provisions for judicial separation. The conditions under which divorce is to be allowed are far more stringent than the conditions under which judicial separation may be granted.

(e) Cruelty[40]

(*i*) ***Meaning explained***.—In *Shobha Rani case*[41] the Supreme Court said that the word "cruelty" has not been defined in the Hindu Marriage Act. The word as used in Section 13(1)(*i-a*) of the Act is with reference to human conduct or behaviour in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be *mental* or *physical*, intentional or unintentional. If it is physical it is a question of fact and degree. If it is mental, the inquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to

---

38. Raman Mittal; Asstt. Research Professor, ILI New Delhi in 46 JILI (2004) 418-423.
39. *Swarajya Lakshmi* v. *G.G. Padma Rao*, (1974) 1 SCC 581.
40. By the Marriage Laws (Amendment) Act, 1976, cruelty has been made a ground for divorce.
41. *Shobha Rani* v. *Madhukar Reddi*, (1988) 1 SCC 105, 108: 1988 SCC (Cri) 60: AIR 1988 SC 121.

be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and *per se* unlawful or illegal. Then the impact of the injurious effect on the other spouse need not be inquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case if, by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. Intention is not a necessary element in cruelty.[42]

What constitutes cruelty must depend upon the terms of the statute. The inquiry therefore has to be into the conduct charged as cruelty, i.e. whether it is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. It is not necessary, as under the English law[43], that the cruelty must be of such a character as to cause danger to life, limb or health or as to give rise to a reasonable apprehension of such a danger. Clearly, danger to life, limb or health or a reasonable apprehension of it is a higher requirement than a reasonable apprehension that it is harmful or injurious for one spouse to live with the other.[44]

What must be determined is not whether the petitioner has proved the charge of cruelty having regard to the principles of English law, but whether the petitioner proves that the respondent has treated him with such cruelty as to cause a reasonable apprehension in his mind that it will be harmful or injurious for him to live with the respondent.... It is wrong except in the context of such apprehension, to import the concept of a reasonable man as known to the new law of negligence for judging of matrimonial relations. Spouses are undoubtedly supposed and expected to conduct their joint venture as best as they might but it is no function of a court inquiring into a charge of cruelty to philosophise on the modalities of married life. The court has to deal, not with an ideal husband and an ideal wife (assuming any such exist) but with the particular man and woman before it.[45]

The legal concept of cruelty is a question of fact which can be decided with reference to facts and circumstances of each individual case. The court can examine evidence in appeal also.[46]

The expression "actual physical harm or a reasonable apprehension thereof" covers cases of mental cruelty also. It may be that mental cruelty may cause more serious harm or injury than physical injury.

---

42. *Shobha Rani* v. *Madhukar Reddi*, (1988) 1 SCC 105, 108: 1988 SCC (Cri) 60: AIR 1988 SC 121.
43. *Russel* v. *Russel*, 1897 AC 395.
44. *Narayan Ganesh Dastane* v. *Sucheta Narayan Dastane*, (1975) 2 SCC 326.
45. *Ibid.* at pp. 337, 339, 344, 345.
46. *Devram Bilve* v. *Indumati*, (2000) 10 SCC 540.

Summary

Summarising the previous discussion one may recapitulate that unlike "desertion" cruelty is not defined by the legislature in the HMA. But one cannot expect a general and exhaustive definition which would not fail in some cases.[47]

Having regard to the sanctity of marriage in community, the court should consider whether the consent of the counter-petitioner is such that it has become intolerable for the petitioner any longer and to live together is impossible.[48] In this area the law has become rightly more sensitive to the pain of the sufferers in wedlock.

Cruelty can be of both kinds: Physical and mental. In judging whether a particular behaviour is cruel the court has to keep before it the following points:

(*i*) The court is not to deal with an ideal husband or ideal wife, but with a particular husband and wife who are not able to drown their differences, their likes and dislikes and their particular attitudes.[49]

(*ii*) The judge should not see from the standard of his own views. There may be generation gap.[50]

(*iii*) He should not import the concept of a reasonable man as defined in the law of tort. He must have a concrete and practical approach and should not make any a priori assumptions about the parties.[51]

(*iv*) Cruelty is to be judged by considering the endurance of the petitioner. What is cruelty is one case may not be 80 (due to various factors) in another case.[52] Respondents behaviour cannot be termed as cruel unless the appellant feels pained or tortured thereby.[53]

(*v*) If the conduct complained of is bad enough and *per se* unlawful or illegal, cruelty will be established if it is proved or admitted and its injurious impact on the victim need not be enquired into.[54]

(*vi*) Behaviour of the spouses inter se should be considered in order to find out whether or not the respondents treatment is cruel.[55]

---

47. *Parveen Mehta* v. *Inderjit Mehta*, (2002) 5 SCC 706; *Savitri Pandey* v. *Prem Chandra Pandey*, (2002) 2 SCC 73.
48. *Anita Krishna Kumar Kachba* v. *Ramchandra Kachba*, (2003) 2 HLR 600 (Bom); See *A. Jayachandra* v. *Aneel Kaur*, (2005) 2 SCC 22, para 10; *Vinita Saxena* v. *Pankaj Pandit*, (2006) 3 SCC 778.
49. *N. G. Dastane* v. *S. Dastane*, (1975) 2 SCC 326, para 32: AIR 1975 SC 1534; *Shobha Rani* v. *Madhukar Reddi*, (1988) 1 SCC 105.
50. *Vanita Saxena* v. *Pankaj Pandit*, (2006) 3 SCC 778.
51. *Ibid.*
52. *Shobha Rani* v. *Madhukar Reddi*, (1988) 1 SCC 105; *G.V.N. Kameshwar Rao* v. *G. Jabilli*, (2002) 2 SCC 296; *Kanta* v. *Om Prakash*, (2003) 2 HLR 272 (P&H); *Om Prakash* v. *Paro*, (2004) 1 HLR 155 (P&H); *Neelam Kumari* v. *Gurnam Singh*, (2004) 1 HLR 734 (P&H).
53. *Jairnail Kaur* v. *Swarn Singh*, (1979) HLR 415 (P&H).
54. *Shobha Rani* (ante).
55. *Gurbachan Kaur* v. *Sardar Swaran Singh*, AIR 1978 All 255; *Tajinder Vohra* v. *Manmohan Singh Vohra*, (2001) 2 HLR 382 (P&H).

(*vii*) Cruelty does not depend upon the number of painful assaults but depends upon their nature and degree. Taken singly they may not seem cruel but when combined together. They may be so.[56]

(*viii*) *Lalita* v. *Om Prakash*,[57] two sisters were married to two brothers. Within a week of the marriage they were mistreated by their husbands and slapped and vulgur language was hurled by their husbands who were in an inebriated condition. They demanded scooter and the girls were not given food. When they left for their father's house they were threatened that if they disclosed this incident to their parents they would suffer the consequences. The sisters sought dissolution of marriage on the ground of cruelty. Trial Court's estimation of cruelty was impractical as it held that the period of cruelty was too short to come to a definite conclusion. On appeal the High Court held that it is the enormity of the offence caused to the victim that matters and not the period during which it is caused, which is decisive.

(*ix*) The measure of cruelty varies from time to time. No precedents should therefore be followed in this regard but each case must be decided afresh on its own facts and circumstances.[58]

(*x*) Events that took place before filing of the petition are decisive, but the events that happen after filing the petition (allegations made in written statement) are also important and court has jurisdiction to take a note thereof.[59]

(*xi*) If there is no serious misunderstanding between the wife and the husband, behaviour of their relatives cannot be considered to come to the conclusion of cruelty.[60]

(*xii*) As held in *Shobha Rani's case*[61] "intention is not a necessary element in cruelty". Relief cannot be denied to the party on this ground.[62]

(*ii*) ***Instances***.—Refusing to prepare tea for the husband and his friends[63] and thus belittling him before his friends, lodging false police complaint against the husband,[64] terminating pregnancy without her husband's consent;[65] inflicting such mental pain and suffering upon the other party so as to make it impossible

---

56. *Karena* v. *Jiwan Prakash*, (2002) 1 HLR 685 (HP DB).
57. (1994) 2 HLR 124 (P&H).
58. *Umribai* v. *Chittar*, AIR 1966 MP 205; *Yamunabai* v. *Narayan Moreshvar Pendse*, ILR (1875-1878) 1 Bom 164 (view expressed in this case has been rejected nowadays.
59. *Surbhi Agarwal* v. *Sanjay Agarwal*, (2000) 2 HLR 52 (MP DB).
60. *Kamlesh Kumar Agarwal* v. *Mamta Devi*, (2005) 1 HLR 38 (Jhar DB).
61. (1988) 1 SCC 105.
62. *Ibid*. para 18.
63. *Kalpana Srivastava* v. *Surendra Nath*, AIR 1985 All 253; *see* also *Kishan* v. *Bimla*, Divorce and Matrimonial Cases, 1988 (1) 39 (P&H).
64. *Ibid*.
65. *Ibid*.

for him to live with the other;[66] calling one's (advocate) husband a lunatic and alleging that a streak of insanity ran through his entire family;[67] calling one's husband impotent;[68] complaining against one's husband (an Army Officer) before his superiors and accusing him of committing adultery and thus causing him mental torture and humiliation;[69] calling the husband a drunkard and one who indulges in adultery[70] are some instances of cruelty.

Insulting and mentally torturing a husband, lodging false complaints against him and his parents, refusing to cohabit with him,[71] (wife) becoming pregnant through some person other than her husband[72] and attempting to commit suicide[73] and thus threatening one's husband[74] amount to cruelty. As a wife can treat her husband with cruelty, so also a husband can do so. Continuous demand of dowry,[75] ill-treating her to such an extent as to drive her to attempt to commit suicide,[76] charging a wife with committing theft of ornaments in the house, refusing to take her to doctor when she was in an advanced stage of pregnancy,[77] and alleging that wife is leading an immoral life are instances of treating the wife with cruelty.

In *Dastane* v. *Dastane* Justice Vaidya has enumerated five tests for cruelty.[78]

Demand by husband of some money from wife having money and assets purely for personal expenses for himself, however, would not constitute a demand for dowry amounting to cruelty.[79] Similarly, drunkenness itself is not cruelty, but persistent drunkenness in spite of several warnings is cruelty.[80] A

---

66. *V. Bhagat* v. *D. Bhagat*, (1994) 1 SCC 337: AIR 1994 SC 710; *Vijay Kumar Ramachandra Bhate* v. *Neela V. Bhate*, (2003) 6 SCC 334: AIR 2003 SC 2462 (allegations of extra-marital relationship with a person outside wedlock).
67. *Sharda* v. *Dharampal*, (2003) 4 SCC 493: (2003) 2 KLT 243 (unsoundness of mind of husband).
68. *Shanti Devi* v. *Raghav Prakash*, AIR 1986 Raj 13; *see* also *Nirmala Jagesha* v. *Manohar Jagesha*, AIR 1991 Bom 259; *Ashok Sharma* v. *Smt Santosh*, AIR 1987 Del 63.
69. *Jalan* v. *Jalan*, AIR 1988 All 239; *see* also *Parihar* v. *Parihar*, AIR 1978 Raj 140.
70. *Kamini Gupta* v. *Mukesh Kumar Gupta*, AIR 1985 Del 221.
71. *Rajni* v. *Shantilal*, DMC 1992 (1) 409 MP; *Jaikrishna Panigrahi* v. *Smt Surekha Panigrahi*, AIR 1996 AP 19; *M. Aruna Kumari* v. *A.V. Janarhana Rao*, (2002) 10 SCC 478 (no resumption of cohabitation); *A. Jayachandra* v. *Aneel Kaur*, (2005) 2 SCC 22: AIR 2005 SC 534 (irretrievable breakdown of marriage.); *Prasanna Tripathi* v. *Arundhati Tripathi*, (2005) 7 SCC 353: AIR 2005 SC 3297 (cruelty and desertion); *Gita Jagdish Mangtani* v. *Jagdish Mangtani*, (2005) 8 SCC 177: AIR 2005 SC 3508 (desertion and abandonment of spouse); *Navin Kohli* v. *Neetu Kohli*, (bad temper and rude behaviour of wife. Living separately for more than 10 years.) Lawyers' Collective April, 2006 p. 17 unreported, so far.
72. *Parvin Singh* v. *Kanchna Devi*, DMC 1990 (1) 24 HP; *Parihar* v. *Parihar*, AIR 1978 Raj 140.
73. *Rama Kanta* v. *Mohinder Laxmi Das Bhandula*, AIR 1996 P&H 98.
74. *Sushila* v. *Omprakash*, DMC 1993 (1) 358 P&H.
75. *Shobha Rani* v. *M. Reddi*, (1988) 1 SCC 105.
76. *Deva Kumar* v. *Thilagavathy*, AIR 1995 Mad 116.
77. *Devinder Pal Singh* v. *Smt Sanjogta Rani*, AIR 1995 P&H 274.
78. *Dastane* v. *Dastane*, AIR 1970 Bom 312; see also *Shobha Rani* v. *M. Reddi*, (1988) 1 SCC 105.
79. *Shobha Rani* v. *M. Reddi*, (1988) 1 SCC 105.
80. *Rita* v. *Brij Kishore Gandhi*, AIR 1984 Del 291.

solitary instance of emotional outburst or violent behaviour is no cruelty.[81] Defects of temperament such as moodiness, whimsicality or inconsiderate nature are to be accepted and tolerated as they do not amount to cruelty.

Similarly unhappiness in marriage[82] and premarriage conduct of either spouse cannot be regarded as cruelty in law under this Act.

One may accept the observations of the Privy Council that there can be no special concept of cruelty confined to a particular community only and the test of it should be based on "universal and humanitarian standards". This is relevant to the interpretation of Section 13(1)(*i-a*).[83] Since the concept of "cruelty" is fast changing precedents cannot always be relied upon, said the Supreme Court in *Shobha Rani case*[84].

In *A. Jayachandra* v. *Aneel Kaur*[85] considering the question of mental cruelty the court observed that it has to be considered in the light of the social status of the parties, their education, physical and mental conditions, and customs and traditions. On these things the court has to draw inference and decide on the basis of the probabilities of the case having regard to the effect on the mind of the complainant spouse because of the acts or omissions of the other spouse. However, where the conduct complained is bad enough in itself and per se unlawful or illegal the impact or injurious effect on the other spouse need not be considered. In such cases, cruelty will be established if the conduct itself is proved or admitted. To constitute cruelty the conduct complained of should be "grave and weighty" whereupon it can be concluded that the petitioner spouse cannot reasonably be expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". In this case the husband filed a divorce petition. Both the husband and wife were professional doctors. The wife was suspecting the husband's fidelity, character and reputation (though such allegations were taken denied by her). The wife admitted to have advised her husband to follow five things, most of which were related to ladies working in the hospital, like, not to call female staff members for work in hospital during off-duty hours, and not to work behind closed doors with certain members of staff. The wife was using abusive language against her husband and was alleging extra-marital relationship with another married lady (denied by wife, but evidence establishing the contrary). Held, that the so-called advices were nothing but casting doubt on the reputation, character and fidelity of her husband. Constant nagging on these aspects amounted to causing indelible mental agony and amounted to cruelty. That apart, the wife's conduct subsequently i.e. after filing of divorce petition indicating irretrievable

---

81. *Gangadharan* v. *Thankam*, AIR 1988 Ker 244.
82. *Adya* v. *Anuradha*, AIR 1980 Kant 8.
83. *Munshi Buzloor Ruheem* v. *Shumsoonnissa*, (1867) 11 MIA 551, 615.
84. *Shobha Rani* v. *M. Reddi*, (1988) 1 SCC 105.
85. (2005) 2 SCC 12: AIR 2005 SC 534. See also *Lavanya* v. *Chiranjeevi*, (2005) 11 SCC 194 (specifying mental cruelty).

breakdown of marriage. Held, therefore, that the husband was entitled to decree for divorce.[86]

One has to note that cruelty has been one of the most common grounds for matrimonial relief and more husbands alleged victimization at the hands of their wives, than wives against their husbands.[87]

In one case the husband visited the wife's office and humiliated her by using objectionable language in presence of her colleagues and called her a prostitute.[88] Beating and causing burns to the wife was also a clear case of cruelty and was not a reasonable wear and tear of marriage.[89] Demanding money from the wife for purchase of a car[90], making allegation of unchastity of the wife[91] were held to be grave assaults on the wife's character and were sufficient to substantiate cruelty in law. Drunkenness *per se* or consuming excessive liquor is not an independent ground which alone by itself amounts to cruelty.[92] But a wife levelling false and slanderous allegations of illicit relations with other lady.[93] Indian filing a false complaint under Section 498-A of the, Penal Code and on other criminal charges amounts to cruelty.[94]

Social status, environment, education, mental and physical conditions and the susceptibilities of the innocent spouse as also the customs and manners of parties do matter but singly they cannot constitute cruelty unless all come together. Similarly the mere fact that the erring spouse is moody, whimsical, mean, stingy, selfish, boorish, irritable and inconsiderate etc. will not be sufficient. Again, mere neglect or want of affection, expression of hatred will not be a conduct constituting cruelty. The idiosyncrasies of the wife sometimes may not amount to cruelty even though they make the husband unhappy. There may be occasions where conduct may lead to unpleasantness but such unpleasantness alone may not be cruelty and may reasonably fall within the ambit of ordinary wear and fear of matrimonial life which is not sufficient to establish cruelty as envisaged under the Act. However, in matrimonial life, acts and conduct amounting to mental cruelty are abound and have sometimes more devastating effect than acts of physical violence.[95]

The High Court said that although the grounds of divorce have been liberalized[96] they nevertheless continue to form an exception of the general

---

86. Relied on *Shobha Rani* v. *Madhokar Reddy*, (1988) 1 SCC 105; 1988 SCC (Cri) 60; *N.D. Datane* v. *S. Dastane*, (1975) 2 SCC 326.
87. In 2003 *see* XL ASIL (2004) 260.
88. *Kala Kumari* v. *Ram Bhavan Anand*, AIR 2004 All 54 (cruelty).
89. *Meera* v. *Rameshchand*, AIR 2004 Raj 193 (Jaipur Bench).
90. *Manmohan Singh* v. *Anita Preet*, AIR 2004 (P&H) 55 NOC.
91. *Jai Dayal* v. *Shakuntala Devi*, AIR 2004 Del 39.
92. *Harjeet Kaur* v. *Roop Lal*, AIR 2004 P&H 22, at p. 25.
93. *D.N. Sharma* v. *Usha Sharma*, AIR 2004 Del 198.
94. *Gajalakshmi* v. *Saravanan*, AIR 2004 (Mad) 459 NOC. See also *Neelam Kumari* v. *Gurnam Singh*, AIR 2004 P&H 9 at p. 16.
95. *Naveen Kohli* v. *Neelu Kohli*, (2006) 4 SCC 588.
96. *Neelu Kohli* v. *Navin Kohli*, AIR 2004 All 1, reversed in *Naveen Kohli* v. *Neelu Kohli*, (2006) 4 SCC 588.

principles favouring continuation of the marital tie. The Supreme Court however reversed the High Court's order and stated that[1] once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties. A law of divorce based mainly on fault is inadequate to deal with a broken marriage. Under the fault theory, guilt has to be proved; divorce courts are presented with concrete instances of human behaviour as they bring the institution of marriage into disrepute. Once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied forever to a marriage that in fact has ceased to exist. While exercising the matrimonial jurisdiction, the court is not merely concerned with the right of the private parties, but it has to keep in view the matter of the public policy as well . . . that marriages contemplated under the Act as an institution of matrimony which under the Hindu law is a sacrament and not a mere socio-legal contract, is not performed for mere emotional gratification and not a mere betrothal but its contents are religious, should not be annulled on lighter grounds.[2]

Summary of Some more Instances of (a) physical and (b) mental cruelty[3]

(*a*) Physical cruelty:

(*i*) Repeated beating or beating after a long course of ill-treatment,[4]

(*ii*) Burning any limb of body,[5]

---

1. *Naveen Kohli* v. *Neelu Kohli*, (2006) 4 SCC 588 (paras 72-76); see also *Samar Ghosh* v. *Jaya Ghosh*, (2007) 4 SCC 511.
2. By the Marriage Laws (Amendment) Act, 1976.
3. See *Modern Hindu Law*, Chap. IV, pp. 71 to 416.
4. *Mohinder Kumar* v. *Shardha Rani*, (1978) HLR 562 (P&H); *Usha* v. *Vimal Kumar*, (1987) 1 HLR 166 (MP).
5. *Karnail Singh* v. *Bhupinder Kaur*, AIR 1973 P&H 19.

(*iii*) Stabbing,[6]

(*iv*) Causing fracture of any organ,[7]

(*v*) Administering or feeding something that injures health,[8]

(*vi*) Beating, neglect in providing food or starving,[9]

(*vii*) Keeping in illegal confinement,[10]

(*viii*) Making attempt on life.[11]

(*b*) Mental cruelty:

(*i*) False charge of unchasity,[12]

(*ii*) False charge against the wife that she was not a virgin and.

(*iii*) That she was suffering from venereal disease,[13]

(*iv*) Compelling the wife to adopt the life of a prostitute,[14]

(*v*) Marrying another woman,[15]

(*vi*) Indulging in love affairs with another woman and going to the length of promising to marry her and keeping her like his wife in the same house in which the petitioner lives,[16]

(*vii*) Issuing invitations for his second marriage to the father of the wife and other relations,[17]

(*viii*) Wife's joining the *Brahmakumari* sect and renouncing all interest in matrimonial relations with the husband,[18]

(*ix*) Attempt to commit suicide and then lodging a false complaint against the other party resulting in prosecution,[19]

(*x*) Repeated threats to commit suicide,[20]

(*xi*) Wife's having undesirable relations with some other person, refusal to discontinue such relations and also threatening the petitioner to put an end to his life,[21]

---

6. *Vijay Singh* v. *Bhupinder Kaur*, (1993) 2 HLR 67 (P&H).
7. *S.K. Garg* v. *Chanchal Kumari*, (2005) 2 HLR 17 (P&H).
8. *Sayal* v. *Sarla Rani*, AIR 1961 Punj 125: 63 Punj LR 379.
9. *Baburao* v. *Sushila Bai*, AIR 1964 MP 73: ILR 1963 MP 462.
10. *Gurdev Kaur* v. *Sarwan Singh*, AIR 1959 Punj 162: ILR 1959 Punj 809.
11. *Kamlesh Kumari* v. *Krishan*, (1987) 2 HLR 637 (P&H).
12. *Krishna Rani* v. *Chunilal Gulati*, AIR 1981 P&H 119.
13. *Suresh Sharma* v. *Sukhdev Sharma*, (2006) HLR 416 (HP).
14. *Henderson* v. *Henderson*, AIR 1970 Mad 104 (SB): (1969) 2 Mad LJ 196.
15. *Shyamsundar Panda* v. *Shantimani Debi*, AIR 1962 Ori 50: (1961) 3 Ori JD 273; *Sunder Sharma* v. *Madhulata Sharma*, (2000) 1 HLR 290 (Ker); *Satya Narain* v. *Mamta*, AIR 1997 Raj 118.
16. *Lalita Devi* v. *Radha Mohan*, AIR 1976 Raj 1: 1975 Raj LW 549: 1976 HLR 140.
17. *Chand Narain* v. *Saroj*, AIR 1975 Raj 88: ILR (1975) 25 Raj 155: 1975 HLR 494.
18. *Jagan Nath* v. *Krishna Kumari Sharma*, 1980 MLR 105 (P&H).
19. *Rajinder Kumari* v. *Daryodhan Lal*, 1980 HLR 301: 1980 MLR 87 (P&H).
20. *Prakash Kaur* v. *Harbhajan Dass*, (2003) 2 HLR 184 (P&H); *Harvindersingh Marwah* v. *Charanjit Kaur*, (2000) 1 HLR 714 (Bom).
21. *Mohinder Singh Virdi* v. *Malkiat Kaur*, 1978 HLR 699 (P&H).

(*xii*) Marital infidelity of the wife and refusal by her to do household works,[22]

(*xiii*) Imposing a condition by the husband on the educated wife not to do a service (Lecturer, College Education under the Rajasthan PSC in this case),[23]

(*xiv*) Making of false and constant charge of bigamy by the wife against the husband,[24]

(*xv*) Making of false and reckless allegations against the character of the husband and the members of his family in open court so as to injure the reputation of the husband.[25] This may be in a reply to a notice by the other party or in a written statement,[26]

(*xvi*) Repeated rebukes, abuses, nagging, taunts, curses, and compulsions for apologizing needlessly,[27]

(*xvii*) Humiliating in a public place or in the presence of one's friends or colleagues or superior officers,[28]

(*xviii*) Causing injury to one's near and dear, for example, the children, parents, brother etc,[29]

(*xix*) Neglect of and apathy unto the spouse when he or she is seriously ill or hospitalized,[30]

(*xx*) Insisting on a vegetarian and teetotaller wife to drink wine,[31]

---

22. *Barnali Sen* (*nee Dasgupta*) v. *Debasish Sen*, (2002) 1 HLR 192 (Cal DB).
23. *Sohan Sankhla* v. *Lakshmi Parvena*, (2005) 2 HLR 665 (Raj DB).
24. *Shingara Singh* v. *Sukhwinder Kaur*, 1980 HLR 644 (P&H).
25. *Madhu Rani* v. *Tarsem Lal Verma*, 1980 HLR 710 (P&H).
26. *Anita Krishna Kumar Kachba* v. *K. Ramachandra Kachba*, (2003) 2 HLR 600 (Bom): *Avinash Eknath Nikalje* v. *Leela Avinash Nikalje*, (2003) 2 HLR 726 (Bom); *Jasbir Kaur* v. *Beant Singh*, (2003) 2 HLR 614 (P&H): *Rajbala* v. *Sukhbir Singh*, (2003) 2 HLR 360 (P&H): *Om Pati* v. *Raj Bir*, (2003) 2 HLR 336 (P&H).
27. *Rabindranath* v. *Pramila Bala*, AIR 1979 Ori 85 (DB): 47 Cut LT 182; *Pramilabala* v. *Rabindranath*, AIR 1977 Ori 132: 43 Cut LT 98: 1977 HLR 222: 1977 MLR 3; *Jogindra Kaur* v. *Shivcharan Singh*, AIR 1965 J&K 95: 1965 Kash LJ 22; *Mohd. Hosan* v. *State of A.P.*, (2002) 7 SCC 414; *Mahabir Singh* v. *Nirmala Devi*, (1998) 1 HLR 292 (P&H); *Ma'hu Kaksal* v. *Anup Kaksal*, (2005) 2 HLR 679 (UP DB).
28. *N. Sreepadachar* v. *Vasantha Bai*, AIR 1970 Mys 232. See for a different opinion, *Madanlal* v. *Santosh*, 1980 HLR 441 (Bom); *Parveen Mehta* v. *Inderjit Mehta*, (2002) 5 SCC 706.
29. *Gurcharan Singh* v. *Sukhdev Kaur*, AIR 1979 P&H 98: 1979 HLR 155: 1979 MLR 271. The wife left the matrimonial home for her parents house leaving behind a two months old child and refused not only to come back to the husband but also to keep the child and as a result the child died. *Bhagwat* v. *Bhagwat*, AIR 1967 Bom 80: ILR 1966 Bom 482: 67 Bom ILR 837. The husband tried to strangulate at one occasion the brother of his wife and at another her younger son. *Krishna Rani* v. *Chuni Lal Gulati*, AIR 1981 P&H 119. The wife neglected the children, as a result the husband had at times to cook for them and dress them. *Gauri Shankar Dhanwaria* v. *Maya Devi*, (2004) 1 HLR 539 (Del); *Alka* v. *R.K. Gautam*, (1996) 1 HLR 640 Del; *Mahu Kaksal* v. *Anup Kuksal*, (2005) 2 HLR 679 (Uttar DB).
30. *Rajinder Singh Joon* v. *Tara Wati*, AIR 1980 Del 213: 1980 MLR 102 (Del): ILR (1980) 1 Del 381: 1980 HLR 534.
31. *Chand Narain* v. *Saroj*, AIR 1975 Raj 88: ILR (1975) 25 Raj 155: 1975 HLR 494.

(*xxi*) Denial of medical treatment to the wife on the day she arrived at the husband's house, turning her out from his house that very day and later falsely accusing her father of keeping her in illegal detention at his house,[32]

(*xxii*) Refusal to take medical treatment and subject to medical test as advised by doctor,[33]

(*xxiii*) Taking a false plea (by the wife) that she had conceived but unfortunately there was a miscarriage,[34]

(*xxiv*) Making false complaint to police resulting in the loss of reputation and prestige,[35]

(*xxv*) Demand of dowry since it is prohibited by law and is bad enough in itself,[36]

(*xxvi*) Lodging of a false FIR for offences under Sections 107, 151 of the CrPC or 498-A, 323 and 506 of the IPC[37] and demand of dowry,[38]

(*xxvii*) Filing a number of FIRs and getting a number of cases registered., opposing bail application, filing complaints before the Women's Cell and Company Law Board and giving and advertisement the applicant is only an employee of the respondent,[39]

(*xxviii*) Never visiting the house of the spouse, who is living at a distance of less than two hours,[40]

(*xxix*) Constructive desertion,[41]

(*xxx*) False and frivolous complaint to police by the wife as a result of which the husband was mercilessly beaten in her pesence and pushed on her feet,[42]

(*xxxi*) False allegation of mental disorder or schizophrenia, fourteen years after marriage and supplying false news with the intention to disturb the other party,[43]

---

32. *Balbir Kaur* v. *Dhir Dass*, AIR 1979 P&H 162: 1979 HLR 118: 81 Punj LR 113.
33. *Parveen Mehta* v. *Inderjit Mehta*, (2002) 5 SCC 706.
34. *Ibid.*
35. *G.V.N. Kaneswara Rao* v. *G. Jabilli*, (2002) 2 SCC 296; *Rajinder Bhardwaj* v. *Anita Sharma*, (1993) 1 HLR 388 (Del).
36. *Shobha Rani* v. *Madhukar Reddi*, (1988) 1 SCC 105.
37. *Gajjala Shankar* v. *Anuradha*, (2006) 2 HLR 60 (AP DB); *Paramjit* v. *Ranjit Singh*, (1994) 2 HLR 95 (P&H); *Kotti Veera Venkata Padmavathi* v. *Kotti Sriram*, (2003) 2 HLR 167 (AP); *Harpal Kaur* v. *Balbir Singh*, (2001) 2 HLR 265 (P&H); *P.K. Tomar* v. *Archana*, (2003) 2 HLR 710 (All).
38. *Rakesh Sharma* v. *Surabhi Sharma*, (2003) 2 HLR 161 (Raj); *Rajni* v. *Sanjay Kumar*, (2003) 1 HLR 580 (MP).
39. *Naveen Kohli* v. *Neelu Kohli*, (2006) 4 SCC 558.
40. *Ibid.*
41. *Leeladevi Rao* v. *Kuwar Hari Rao*, (2003) 1 HLR 238 (Kant DB); *Ajay Pratap Singh* v. *Amar Bala Singh*, (2001) 2 HLR 291 (P&H).
42. *Harpal Kaur* v. *Balbir Singh*, (2001) 2 HLR 265 (P&H); *Pinki Jain* v. *Sanjay Jain*, (2005) 1 HLR 171 (Del).
43. *J. Sudhakar Shenoy* v. *Vrinda Shenoy*, (2001) 2 HLR 416 (Kant DB).

(*xxxii*) Murder of the petitioner's mother by the respondent,[44]

(*xxxiii*) Refusal to cook food for the husband and insulting him in the presence of his friends and relatives,[45]

(*xxxiv*) Total withdrawal from the society of the petitioner and refusal to cohabit,[46]

(*xxxv*) Writing a letter to an outsider to marriage (brother of the husband) that her husband is impotent,[47]

(*xxxvi*) Charge by the wife and her parents without medical evidence that the husband is suffering from erecticle dysfunction i.e. inability to perform sexual intercourse,[48]

(*xxxvii*) Undergoing family planning operation without the consent of the other party,[49]

(*xxxviii*) Physically pushing the mother-in-law out of the house,[50]

(*xxxix*) Tutoring the children against the other parent,[51]

(*xl*) Misbehaviour with the mother of the husband and his children from the first wife,[52]

(*xli*) Drunkenness mixed with neglect in maintaining the family,[53]

(*xlii*) Non-intimation to the husband about the illness and death of the child,[54]

(*xliii*) Wife's asking the husband to separate himself from parents and brothers, using abusive language for husband and other members of family and refusing to do household works.[55] However if the wife reasonably insists on a separate matrimonial home for conjugal privacy with her husband, it is no cruelty,[56]

(*xliv*) Second wife not willing to keep the children of the first wife with the family,[57]

---

44. *Johar Mal* v. *Guddi*, (2002) 2 HLR 325 (Raj).
45. *Rukmani Devi* v. *Badri Narayan*, (2002) 1 HLR 648 (Raj).
46. *Karuna* v. *Jiwan Parkash*, (2002) 1 HLR 685 (HP DB); *Gayatri Misra* v. *Promod Kumar Nanda*, (2000) 1 HLR 438 (Ori DB); *Aruna Jalan* v. *Ramesh Chand Jalan*, (1980) 2 HLR 497 (All).
47. *G. Padmini* v. *C. Sivananda Babu*, (2000) 2 HLR 99 (AP DB).
48. *Susarla Subrahmanya Sastry* v. *S. Padmakshi*, (2005) 2 HLR 709 (AP DB).
49. *Balbir Kaur* v. *Gurdev Singh*, (2000) 1 HLR 316 (P&H).
50. *Jaiprakash Dattatray Patade* v. *Usha Jaiprakash Patade*, (2005) 1 HLR 172 (Bom DB); *Sadhana Srivastava* v. *Arvind Kumar Srivastava*, (2006) 1 HLR 148 (All DB).
51. *Jaiprakash Dattatray Patade* v. *Usha Jaiprakash Patade*, (2005) 1 HLR 172 (Bom DB).
52. *Harsha Indukumar Bhojani* v. *Indukumar Ratilal Bhojani*, (2004) 2 HLR 572 (Bom DB).
53. *Mina Verma* v. *Kirit Verma*, (1999) 2 HLR 454 (Pat); *Geeta* v. *Mohan*, (1992) 1 HLR 367 (Ker DB); *Rita* v. *Brij Kishore Gandhi*, AIR 1984 Del 291.
54. *Jyotsna Mukherjee* v. *Sri Utpal Mukherjee*, (1999) 2 HLR 43 (Cal DB).
55. *Manisha Jha* v. *Kunal Kanti Jha*, (1998) 1 HLR 578 (Cal).
56. *Kakali Das (Ghosh)* v. *Asish Kumar Das*, (2004) 1 HLR 448 (Cal DB).
57. *Sudha Narayan Gokhale* v. *Narayan Shankar Gokhale*, (1994) 2 HLR 633 (Bom).

(*xlv*) Making wild, reckless and baseless allegations in the written statement.[58] But if they are provided by the pleadings of the other party, there is no cruelty,[59]

(*xlvi*) Unethical relationship with someone coupled with unusual indifference to the sentiments and emotions of the former spouse,[60]

(*xlvii*) Voluntary abortion without the consent of the petitioner,[61]

(*xlviii*) Varied litigation (six civil and four criminal cases) pending between the parties,[62]

(*xlix*) Withdrawing from the society of husband and living with parents, supporting them, her brother and sister with her pay,[63]

(*l*) Withdrawing from matrimonial home leaving the minor daughters to the care and custody of the husband knowing full well that he has to be on night-duty sometimes,[64]

(*li*) Abnormal behaviour of not washing hands after answering the call of nature, not dressing properly after taking bath, urinating in the street, and quarrelling when advised to mend these ways,[65]

(*lii*) Forcing the wife to satisfy the lost of the persons who visited the husband,[66]

(*liii*) False charge of impotence,[67]

(*liv*) Wife's addressing her husband as brother on the first night after marriage,[68]

(*lv*) Beating of the husband by the father and brother of the wife in her presence and her failure to rescue the husband.[69] It is submitted that it is a case of both mental and physical cruelty, more of the former category than the latter,

(*lvi*) Birth of an illegitimate child within seven months from the date of marriage,[70]

---

58. *Manisha Sandeep Gade* v. *Sandeep Vinayak Gade*, (2005) 1 HLR 400 (Bom DB); *Nirmala Manohar Jagesha* v. *Manohar Shivram Jagesha*,(1992) I HLR 688 (Bom).
59. *Kakali Das (Ghosh)* v. *Ashish Kumar Das*, (2004) 1 HLR 448 (Cal DB).
60. *Dilip Kumar Karmakar* v. *Biju Rani Karmakar*, (2004) 1 HLR 630 (Cal DB).
61. *Lakshmi Shanmugham* v. *P.R. Shanmugham*, (1995) 2 HLR 685 (Mad); *Sushil Kumar Verma* v. *Usha*, (1986) 2 HLR 104 (Del).
62. *P.K. Vijayappan Nair* v. *Ammini Amma*, AIR 1997 Ker 170.
63. *Meena Rani* v. *Mohan Lal*, (1996) 2 HLR 262 (P&H).
64. *Dalbir Kaur* v. *Daljit Singh*, (1996) 2 MLR 644 (P&H).
65. *Uma Wanti* v. *Arjun Dev*, AIR 1995 PAH 312.
66. *Sukhwinder Kaur* v. *Hernek Singh*, (1988) 1 HLR 432 (P&H).
67. *Raj Dulari* v. *Ramesh Chander*, (1987) 2 HLR 375 (P&H).
68. *Savita Chadha* v. *Ravinder Singh Chadha*, (1987) 2 HLR 412 (P&H).
69. *Surinder Singh* v. *Tejinder Singh*, (1987) 1 HLR 86 (Del); *Sudesh Verma* v. *Achhar Kumar*, 1980 MLR 275 (HP).
70. *Madan Lal* v. *Sudesh Kumari*, (1987) 1 HLR 384 (Del).

(*lvii*) Launching a false criminal prosecution against the husband for the offence of bigamy under Section 494 of the IPC, because second marriage invites very serious repercussions,[71]

(*lviii*) Brothers of the husband wanted sexual relations, even force was used for this purpose,[72]

(*lix*) Keeping a concubine,[73]

(*lx*) Making a false complaint to the superior of the husband that he ill-treated her which lowered the husband in the eyes of his employer and affected his career and promotional opportunities,[74]

(*lxi*) Depriving voluntarily a spouse of one's society and cohabitation for a long period,[75]

(*lxii*) Perversion of sexual behaviour,[76]

(*lxiii*) Impotence.[77]

Cases wherein there was no cruelty

In the following cases it was held that there was no cruelty. (1) Petty quarrels and troubles[78], (2) solitary quarrel and repeated threat to commit suicide[79], (3) solitary and or occasional beating of the wife by the husband[80], (4) beating of the child and quarrel between the couple[81], (5) Persuading and pressing on unwilling wife to accompany the husband to his place,[82] (6) Refusal to give treatment and diet as prescribed by a doctor, because that was beyond the means of the husband,[83] (7) Refusal to help the son-in-law (petitioner) by the father-in-law[84], (8) Desertion for a period less than prescribed[85], (9) mere

---

71. *Rajkishore Prasad* v. *Rajkumari Devi*, (1986) 2 HLR 36 (Pat). Reported again in the same Journal at p. 221.
72. *Amarjit Kaur* v. *Govind Singh*, (1986) 1 HLR 259 (P&H).
73. *Devanti Devi* v. *Rupam Tanty*, (2005) 2 HLR 56 (Jhar DB).
74. *Pranati Chatterjee* v. *Shri Gautam*, (2006) 2 HLR 21 (Cat DB); *Shakuntala Kumari* v. *Om Prakash*, AIR 1981 Del 53; *D. Manga* v. *D. Venkata Ramana*. (2000) 2 HLR 178 (AP DB); *Meenakshi Mehta* v. *Major Atul Mehta*, (1999) 2 HLR 68 (HP DB); *P. Kalyanasundram* v. *K. Paquialatchamy*, (2004) 1 HLR 339 (Mad DB); *Dharam Pal* v. *Pushpa Devi*, (2006) 1 HLR 196 (P&H DB).
75. *P. Kanta Devi* v. *Suresh*, (1993) 2 HLR 434 (P&H); *Deepayan* v. *Papiya*, (1990) 2 HLR 444 (Cal); *Basudele Nath* v. *Dipti Kona Nath*, AIR 1998 Gau 107; *Avinash Prasad Srivastava* v. *Chandramohini*, AIR 1964 All 486.
76. *Vinita Saxena* v. *Pankaj Pandit*, (2006) 1 HLR 586 (SC).
77. *Sirajmohamed Khan* v. *Hafizunnisa Yasinkhan*, (1981) 4 SCC 250.
78. *J. L. Nanda* v. *Veena Nanda*, (1988) Supp SCC 112.
79. *Tapan Chakraborty* v. *Anjali Chakraborty*, (1983) 1 HLR 353 (Cal DB); *Asha Gupta* v. *Rajiv Kumar Gupta*, (2005) 1 HLR 421 (P&H).
80. *Tulsa* v. *Pannalal*, AIR 1963 MP 5.
81. *Harpal Sharma* v. *Tripta Rani*, (1994) 1 HLR 151 (P&H).
82. *Anna Saheb* v. *Tarabai*, AIR 1970 MP 36.
83. *Shyamlal* v. *Saraswati Bai*, AIR 1967 MP 204.
84. *Rukman Kanta* v. *Faquir Chand*, AIR 1960 Punj 493.
85. *Kaushalya Rani* v. *Vijay Singh*, AIR 1973 Raj 269 (Desertion for a period less than two years).

consumption of alcohol by the husband unaccompanied by abuses, insults and violence,[1] (10) Wife knowingly abandoning her 13 months old child at her husband's house just to induce the husband to bring her back to his home,[2] (11) Wife's non-co-operation in the performance of household duties — refusal to serve tea to husband's friends, her getting employed against her husband's wishes, taunting her husband,[3] (12) Husband negligent about wife's health, not visiting her even after she gave birth to a child,[4] (13) Husband accusation of adultery which is neither false[5], nor denied,[6] (14) False charge of illicit relationship against each other,[7] (15) Refusal to sign document for the purchase of property by the appellant[8], (16) Removal of mangalsutra at husband's instigation,[9] (17) Seeking help from Women's Protection cell for reconciliation and the husband and his family members seeking anticipatory bail out of panic,[10] (18) Mere filing of an FIR u/s 498A, IPC by wife against the husband, [11] (19) Suggesting the husband to start his own business independent of his parents and take money from her parents for that purpose,[12] (20) Asking one to give a loan to one's relations,[13] (21) Charging ladies of family that they drink regularly,[14] using abusive language and quarrelling frequently,[15] neglecting children,[16] (22) living separately for 20 years due to husband's unwillingness to live together,[17] (23) sending a letter to her mother on the strength of which a warrant of recovery was obtained by her parents from a magistrate to save her life,[18] (24) institution of proceeding u/s 125 CrPC for claiming maintenance from the husband,[19] (25) To live with a wife who is a victim of gang rape,[20] (26) Wife taking away her ornaments as they are her own property[21], (27) Initiation of legal proceedings under Sections 498-A and 323 of IPC against the husband, which failed,[22] (28) wife

---

1. *Chand Narain* v. *Saroj*, AIR 1975 Raj 88; *Harjit Kaur* v. *Roop Lal*, (2004) 1 HLR 143 (P&H).
2. *Kiran* v. *Ashok Kumar*, 1980 HLR 758 (P&H).
3. *Santosh* v. *Bharat Bhushan*, 1980 HLR 85 (P&H).
4. *Rajinder Prasad Jain* v. *Rama Jain*, 1980 HLR 122 (P&H).
5. *Anil Kumar Banerjee* v. *Sefali Banerjee*, AIR 1997 Cal 6.
6. *A.R. Arun Kumar* v. *Nalini*, (2003) 1 HLR 247 (Kant); *Rajbala* v. *Gajender Singh*, (1989) 1 HLR 443 (P&H).
7. *Sulochana* v. *Ramkumar Chauhan*, AIR 1981 All 78.
8. *Perminder Charan Singh* v. *Harjit Kaur*, (2003) 10 SCC 161.
9. *S. Hanumanth Rao* v. *Ramani*, (1999) 3 SCC 620.
10. *Asha Gupta* v. *Rajiv Gupta*, (2005) 1 HLR 421 (P&H).
11. *Virender Kumar* v. *Santro Devi*, (2003) 2 HLR 401 (P&H).
12. *Harish Kumar Ledwani* v. *Anita Ledwani*, (2003) 2 HLR 716 MP.
13. *Sat Pal Singh* v. *Baljit Kaur*, (2001) 2 HLR 246 (P&H).
14. *Prabhas Saxena* v. *Ranjan Saxena*, (2001) 2 HLR 553 (Del DB).
15. *K.R. Manjunath* v. *Veena*, (1999) 2 HLR 78 (Kant DB).
16. *Archana Mahajan* v. *Vinod Mahajan*, AIR 1998 MP 220.
17. *Krishanlal Kakkad* v. *Nirmala Khanna*, (1999) 1 HLR 461 (MP DB).
18. *Archana Sharma* v. *Suresh Kumar Sharma*, (1994) 1 HLR 206 (P&H).
19. *Kashinath Namdeo Patil* v. *M.K. Patil*, (1993) 1 HLR 164 (Bom).
20. *Rajesh Kumar Singh* v. *Rekha Singh*, (2005) 1 HLR 759 (All DB).
21. *Suresh Kumar* v. *Sunita*, (2004) 1 HLR 175 (P&H).
22. *Radha Rani* v. *Har Bhagwan*, (2004) 1 HLR 50 (P&H).

going to her parents without husband's permission,[23] (29) Filing a suit against husband to restrain him from remarrying, wife having credible information in this behalf,[24] (30) Domestic quarrels in family[25] and wife refusing to resign her job which is necessary for her economic independence and security,[26] (31) Mere not begetting children in nine years and the husband did never complain of it before the petition for divorce[27], (32) Merely filing criminal cases relating to matrimonial disputes due to emotional reasons subsequent to the strained relationship between the spouses.[28]

The human sensations of pleasure and plain are not qualified by religion so much as to lose their basic nature.[29] The Supreme Court in *Dastane* v. *Dastane*[30] has rightly refused to talk of a Hindu wife and a Hindu husband. There can be no communal character of cruelty.[31] (see Section 2(*viii*)) of the Dissolution of Muslim Marriages Act; see also Section 498-A of IPC; Cruelty under the protection of women from Domestic Violence Act, 2005, Section 3 wherein domestic violence is defined.

If the petitioner condones the cruelty, no relief can be granted.[32]

A disturbing judgment

In *Appasaheb* v. *State of Maharashtra*,[33] a question that came before the apex court for decision was, whether demand for money on account of some financial stringency or for meeting some urgent domestic expenses or for purchasing manure could be termed as demand for dowry. The Supreme Court analysed the term "dowry" and interpreted it in a negative way. Dowry accordingly would mean any property or valuable security given either directly or indirectly at or before or any time after the marriage and in connection with the marriage of the parties. The amount or demand must have, therefore connection with the marriage of the parties. The words in the Act must be construed with reference to a particular purpose for which the Act is enacted. Here, in this case therefore, these kinds of demands could not be termed as "demand for dowry" as the said word is normally understood and acquitted the appellants.

This judgment is quite disturbing. It is common knowledge that money when demanded from girl's parents after marriage is never termed as dowry but considered as contribution to meet the needs of the boy to lead a happy married

---

23. *Kamlesh* v. *Prem Prakash*, (1989) 1 HLR 554 (Raj).
24. *Ram Chand* v. *Mohini Bai*, (1986) 2 HLR 20 (MP).
25. *Yashodabai* v. *K. B. Katavkar*, (1992) 2 HLR 471 (Kant DB).
26. *Vibha Srivastava* v. *Dinesh Kumar*, (1992) 2 HLR 504 (MP).
27. *P. Malleshwaramma* v. *Prathap Reddy*, (2006) 1 HLR 188 (AP DB).
28. *Ibid*.
29. *Munshi Bazloor Rehman* v. *Shamsoonissa*, (1867) 11 MIA 551, 615.
30. (1975) 2 SCC 326: AIR 1975 SC 1534: (1975) 3 SCR 967.
31. *Munshi Bazloor Rehman case*, ante.
32. *Baldev Raj* v. *Bimla Sharma*, (2006) 1 HLR 40 (HP).
33. *Appasaheb* v. *State of Maharashtra*, (2007) 1 Scale 50 ILI News Letter, Vol. IX, Issue 1, Jan-Mar, 2007, p. 9.

life. If the money taken is not to be treated *as loan* but *as contribution* towards meeting family obligations, could it be treated as innocent support to the son-in-law? *The Court, it seems failed to take note of this illegal practices camouflaging the criminal nature. The fact that the good of husbands and in-laws continues to consume besides of both, rich and poor, at regular intervals, has been given a short shift by the court.*

(*iii*) ***Dowry Prohibition Act, 1961 and provisions under IPC.***—It would be worthwhile at this juncture to lay down some important information regarding dowry, cruelty, dowry death and a presumption of law in regard to dowry deaths.

After some portion of Hindu law was codified in 1955-1956 in the form of four Acts, the dragon of dowry raised its head and cruel and cold-blooded deaths of married women increased day by day. It may be due to reaction towards those Acts or due to craze for money of the neo-rich families but the fact remains that the evil of dowry which was in the past in a very mild form and limited to certain castes and areas spread with all its force, like a cancer, in all directions in Indian society.

To curb this mischief and nuisance the government had to enact the Dowry Prohibition Act, 1961 which was later on amended in 1986. The Act made giving, taking and the abetment of dowry an offence.

Even this Act failed to control or stop this inhuman practice and consequently in 1983 by the Criminal Law (Second Amendment) Act (46 of 1983) two Sections, 304-B and 498-A were added to the Penal Code and Section 113-A was added to the Indian Evidence Act.

(I) *Section 304-B (IPC): Dowry death.*—(1) Where the death of a woman is caused by (*a*) any burns or bodily injury or (*b*) occurs otherwise than under normal circumstances (*c*) within seven years of her marriage—

and it is shown that, soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death" and such husband or relative shall be deemed to have caused her death.

Explanation: For the purposes of this sub-section "dowry" shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961.

(2) Whoever commits "dowry death, shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life".

(2) *Section 498-A (IPC): Husband or relative of husband of a woman subjecting her to cruelty.*—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty—

shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation: For the purposes of this section "cruelty" means—

(*a*) any wilful conduct which is of such a nature as is likely to drive the woman—

(*i*) to commit suicide, or

(*ii*) to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(*b*) harassment of the woman—

(*i*) where such harassment is with a view to coercing her, or any person related to her to meet any unlawful demand for any property, or valuable security, or

(*ii*) is on account of failure by her or any person related to her to meet such demand.

(3) *Section 113-A*: (*Evidence Act*): *Presumption as to abetment of suicide by a married woman.*—When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative or any relative of her husband and—

(*i*) it is shown that she had committed suicide within a period of seven years from the date of her marriage, and

(*ii*) that her husband or such relative of her husband had subjected her to cruelty,

(*iii*) the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation: For the purposes of this section, "cruelty" shall have the same meaning as in Section 498-A of the Indian Penal Code.

(*iv*) ***Criticism.***—Section 304-B, IPC defines "dowry death" and explains that "dowry" has the same meaning as given to it in Section 2 of the Dowry Prohibition Act. A person causing dowry death shall be punished with imprisonment for a term not less than seven years but which may extend to imprisonment for life.

Section 498-A IPC defines "cruelty" and says that one who subjects her to cruelty shall be punished with imprisonment for a term which may extend to three years and with fine.

Section 113-A of the Evidence Act raises a presumption that when death of a married woman by suicide is caused within a period of seven years from the date of her marriage and it is shown that her husband or her husband's relative subjected her to cruelty which drove her to commit suicide, the court shall presume that such suicide was abetted by her husband or her husband's relative. The presumption is however rebuttable.

That is why the Hindu Marriage Act, 1956, in Section 13(1)(*i-a*) has inserted "cruelty" as one of the grounds for divorce. Under such circumstances it is better for the woman to leave the husband and save her life.

It must be admitted with regret and shame that in spite of these provisions which go to punish the perpetrators of "cruelty" and "abettors" of suicide with a heavy hand, such offences, like "burning a wife", "beating her to death", "starving her unto death", "torturing her" off and on and "harassing her" on every petty issue, and all this for reasons that dowry demands of her husband and in-laws are not satisfied, are rampant and the government, courts and society look on at it helplessly.

It may be true that the Government is deaf and everything falls on deaf ears but why is society silent? Why do women's organizations not assert themselves on this issue? It is because of lust for money of the husband of the married woman (because she is an heir in her father's property) that such crimes are committed daily. Moreover, courts, instead of doing justice to the complainant, look at the perpetrator of the dowry death crime with a humanistic approach. Instead of punishing the killer, they search here also for "the rarest of the rare case" and, on some pretext, leave the culprit free on benefit of doubt, again to negotiate a second marriage and get dowry.

(f) Desertion

(*i*) ***General***.—As a ground for matrimonial relief desertion is well known to the world. After the amendment of the section in 1976, desertion is a ground for judicial separation as well as for divorce. The sub-section prescribes a minimum duration of time for which desertion must exist in order to qualify as a ground for relief. The duration is (*i*) "a period of not less than two years immediately preceding the presentation of the petition".[34] This is then one of the conditions of the sub-section.

The second and third conditions for desertion are that (*ii*) it should be without reasonable cause, and (*iii*) without the consent or against the wish of the deserted spouse and it includes the wilful neglect of the petitioner.[35]

(*ii*) ***Explanation***.—Desertion in its essence means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. Desertion is not withdrawal from a place but from a state of things. The person who actually withdraws from cohabitation is not necessarily the deserting party.[36] Desertion as expressed by the Allahabad High Court[37] "is not separate living and separate residence, it also includes *animus deserendi* which means 'determination' to put an end to the marital relations and

---

34. S. 12(1)(*i-b*).
35. *See* Explanation to S. 13(1). See *Pranab Kumar Chakraborty* v. *Kum Kum Chakraborty*, (2003) 2 HLR 253 (Cal).
36. *Halsbury's Laws of England*, 3rd Edn., Vol. 12, pp. 453-54.
37. *Rohini Kumari* v. *Narendra Singh*, AIR 1971 All 102.

to put an end to cohabitation permanently". The party deserting should not have in any way contributed towards the commission of the alleged act.

Explaining the concept of desertion and referring to the above passage from *Halsbury's Laws of England* the Supreme Court in *Bipin Chander* v. *Prabhadevi* (a leading case on this concept)[38] observed that in every case of desertion there must coexist:

(*a*) the factum of separation, and

(*b*) *animus deserendi,* i.e., intention to forsake the aggrieved party.[39]

These two factors may not commence at the same time; one may follow the other. It should also be remembered that these two elements must subsist during the whole of the statutory duration (i.e. 2 years). This principle has been reiterated in detail by the Supreme Court in subsequent cases.[40] The court in *Lachman case* (supra) stated that in desertion all the ingredients of constructive desertion, namely animus, factum and want of just cause, must be proved.[41]

The following are regarded as "reasonable cause" for desertion:

(*i*) existence of another wife,

(*ii*) concubinage, and

(*iii*) cruelty.

(*iii*) ***Cases.***—Where such circumstances are created by the husband which compel the wife to leave the house, it is the husband and not the wife who is guilty of desertion.[42] This is constructive desertion in the eyes of the law.

Omission to make efforts for reconciliation and reunion is no bar for a deserted spouse to claim matrimonial relief.[43]

In *Jatinder Nath Kalia case*[44] the husband filed a petition in a foreign court for divorce. The wife in India had no means to contest the proceedings there. A decree was therefore passed against the wife but the Supreme Court held that non-contesting of proceedings there by the wife could not mean that she conceded to the jurisdiction of the foreign court. An ex parte decree of divorce passed against her was violative of the rules of natural justice. This Act does not recognise such a decree. Consequently a subsequent petition for divorce by the

---

38. AIR 1957 SC 176.

39. *Savitri Pandey* v. *Prem Chandra Pandey*, (2002) 2 SCC 73: (2002) 1 HLR 338; *Pranab Kumar Chakraborty, ante, Durga Prasanna Tripathi* v. *Arundhati Tripathi*, (2005) 7 SCC 353.

40. *Rohini* v. *Narendra*, (1972) 1 SCC 1: 1972 SCC (Cri) 1: AIR 1972 SC 459; *Lachman Utamchand Kripalani* v. *Meena*, AIR 1964 SC 40: 66 Bom LR 297. *See* also *Geeta Jagdish Manglani* v. *Jagdish Manglani*, (2005) 8 SCC 177; *Patwant Kumar* v. *Sarabjit Singh*, (2006) 1 HLR 55 (P&H); *Adhyatma Bhattar Alwar* v. *Adhyatma Bhattar*, (2002) 1 SCC 308: (2002) 1 HLR 9 (SC); *P. Kalyan Sundaram* v. *K. Paquialachamy*, (2004) 1 HLR 339 (Mad DB); *Manjit Kaur* v. *Sukhvinder Singh*, (2005) 2 HLR 411 (P&H).

41. *Devinder Pal Singh* v. *Sanjogta Rani*, AIR 1995 P&H 274.

42. *Asha Handa* v. *Baldev Handa*, AIR 1985 Del 76.

43. *Ibid.*

44. *Veena Kalia* v. *Dr Jatinder Nath Kalia*, AIR 1996 Del 54.

wife in India on grounds of adultery, cruelty and desertion was not barred by principles of estoppel or from *res judicata* merely because she had accepted maintenance under a foreign judgment.

Desertion, one must note, does not consist of an act or a series of acts (as in adultery or cruelty) which are separate and distinct; it is rather a continuous course of conduct, persisting for an unbroken period of two years prescribed by the section. This condition is mandatory.[45]

Cause for desertion, on merits, held to be reasonable

(1)(*a*) Keeping a concubine.[46]

(*b*) Having immoral relations with one's brother's wife.[47]

(*c*) Refusal to pay maintenance.[48]

(*d*) Cruel treatment.[49]

(*e*) Character assassination by the husband; refusal to keep her with himself even after she leaves service.[50]

(*f*) Marrying another woman.[51]

(*g*) Beating the wife in the presence of her father and uncle.[52]

(*h*) Refusal of the husband to take the wife back at any cost though the wife is ready to live and cohabit with him unconditionally.[53]

---

45. *P. Kalyan Sundaram* v. *K. Paquialatchamy*, AIR 2004 Mad 43; *Shyamsunder A. Hatchandani* v. *Arti*, AIR 2004 Bom 311; *Somen Kumar Chaudhary* v. *Pranati Choudhary*, AIR 2004 (Jhar) 310 NOC — in all these three cases desertion was by the wife. Her *animus non-revertendi* was established.). In *Shyam Sunder Kohli* v. *Sushma Kohli*, (2004) 7 SCC 747: AIR 2004 SC 5111: (2004) 114 DLT 1. (The husbands' allegations against the wife were false. The wife was forced to leave. The husband was at fault. No desertion by the wife).
46. *Chetan Dass* v. *Kamla Devi*, (2001) 4 SCC 250; *Swapna Chakkrawarti* v. *Viplava Chakrawarti*, (1999) 1 HLR 433 (MP); *Kanchan Sahu* v. *Premananda Sahu*, (1999) 1 HLR 187 (Ori DB); *A. Kuppuswami* v. *Algammal*, AIR 1961 Mad 391: 74 Mad LW 305; *Ambujan* v. *T.S. Ramaswamy*, AIR 1973 Del 46 DB: ILR (1973) 1 All 108.
47. *M.S. Ramaswami* v. *Gomathi Ammal*, (1965) 1 Mad LJ 149.
48. *Gurdev Kaur* v. *Niranjan Singh*, 1980 HLR 42 (P&H). In this case the husband refused to take the wife back despite her efforts for reconciliation and did not pay a penny for the maintenance of the wife and children despite a decree of maintenance in their favour. Then the wife made an application to the Welfare Department for the grant of pension on the ground that she was a widow. She got pension. The husband pleaded that this amounts to desertion by her. Held, the wife was forced by economic pressure to take that desperate step. She had no *animus deserendi*. Hence, there was no desertion on her part.
49. *Sunil Kumar Chowdhary* v. *Satirani Chowdhary*, AIR 1969 Cal 573: 73 Cal WN 721: ILR (1969) 2 Cal 383. In this case the husband beat his wife, took away her ornaments, drove her away from his house and administered medicines to her although they were not prescribed by a doctor. *Virender Singh* v. *Suresh*, (2003) 2 ILR 397 (P&H); *Kulwant Singh* v. *Dalbir Kaur*, (2005) 2 HLR 145 (P&H); *Datta Rajaram Bhosle* v. *Kavita Datta Bhosle*, (2006) 2 HLR 34 (Bom).
50. *Ritu Shobha* v. *Dharampal*, 1980 HLR 355 (P&H).
51. *Ranjit Kaur* v. *Jaswant Singh*, (2002) 1 HLR 167 (P&H).
52. *Chemari Balan Nair* v. *Manikkath Vilasini*, AIR 1998 Ker 313.
53. *Gurmel Singh* v. *Ajit Kaur*, 1980 MLR 157 (P&H): 1979 HLR 157; *Amita Rani* v. *Tilak Raj*, 1979 HLR 486 (P&H): 1979 MLR 332; *Om Prakash Narang* v. *Prabha Narang*, 1980 HLR 176 Del: AIR 1978 Del 240: ILR (1978) 1 Del 495.

(*i*) Turning the wife out of the house and marrying another girl.[54]

(*j*) Turning the wife out after giving her beatings and refusing to take her back despite her efforts for reconciliation.[55]

(*k*) Living separately for the education of children[56] or for one's research work or study.[57]

(*l*) Demand of wealth from in-laws and threatening to murder the wife if the demand is not fulfilled.[58]

(*m*) Making the wife to live in one room place, which did not have even the basic facilities e.g. toilet.[59]

(*n*) Neglect of the baby daughter when she was seriously ill and wife by the husband and his parents, and trying to snatch the daughter from her, forcing her to sign a document for releasing the husband, taking away the ornaments of the baby daughter by the mother-in-law and misbehaviour by the husband at the railway station.[60]

(*o*) Unpalatable atmosphere and reign of terror in the matrimonial home, causing fear of risk to life and limb.[61]

(*p*) Having illicit intimacy with the maid-servant and beating the wife when she complained that the maid-servant abused her.[62]

(*q*) Having illicit relations with a woman and driving away the wife from home.[63]

(*r*) Giving a legal notice to come back in seven days but the notice contained insulting remarks against her and her parents.[64]

(*s*) Inability of the husband to maintain his wife at his place.[65]

(*t*) Husband unemployed but wife carning and agreeable to live with the husband but not permitted to do so.[66]

(*u*) Inflecting mental cruelty by levelling a false charge of adultery.[67]

---

54. *Kalawanti* v. *Jeet Singh*, 1980 HLR 45 (P&H).
55. *Surjit Kaur* v. *Tirath Singh*, 1980 HLR 52 (P&H); *Rajinder Prasad Jain* v. *Rama Jain*, 1980 HLR 122 (P&H): 1980 MLR 135; *Parshottam Lal* v. *Sushila*, 1980 HLR 149 (P&H).
56. *Jaswant Singh* v. *Bhupinder Kaur*, (1980) LR 52 (P&H).
57. *K. Chandana Dhanum Kumari* v. *K. Venkata Vara Prasad*, AIR 1998 AP 225; *Om Prakash* v. *Madhu*, AIR 1997 Raj 214.
58. *Sukhdev Kaur* v. *Mange Singh*, 1980 HLR 703 (P&H).
59. *Harish Kumar Ladwani* v. *Anita Ladwani*, (2003) 2 HLR 716 (MP).
60. *Kamla Sharma* v. *Suresh Kumar Sharma*, (2001) 2 HLR 605 (Raj DB).
61. *Sunil Kumar* v. *Usha*, (1994) 1 HLR 691 (MP).
62. *Reganaoyaki* v. *Arunagiri*, (1993) 2 HLR 78 (Mad).
63. *B.S. Mohan Kumar* v. *B.K. Nirmala*, (2005) 1 HLR 117 (Kant DB); *Devanti Devi* v. *Rupan Tanty*, (2005) 2 HLR 56 (Jhar).
64. *Nitu* v. *Krishan Lal*, (1989) 1 HLR 663 (Del).
65. *Sachindra Nath Paul* v. *Kalpana Rani*, (1988) 2 HLR 507 (Cal).
66. *Julmi Devi* v. *Ram Kumar*, (2006) 1 HLR 471 (HP).
67. *Rajaram* v. *Urmila Devi*, (1986) 2 HLR 124 (MP).

(*v*) Refusal by the wife to live with the husband when he had filed a petition for divorce charging her of adultery.[68]

(2) But on the other hand, the court held that there was no reasonable cause for desertion in the following cases.

(*a*) Refusal by the husband who was the only son of his father, to live separately from his father.[69]

(*b*) Dissatisfaction with the earning of the husband which was clearly known to the wife before marriage.[70]

(*c*) Non-fulfilment of an impracticable condition imposed by the deserting spouse for his or her return.[71]

(*d*) When the wife developed dislike for her husband as a result of her intimacy with her brother-in-law.[72]

As observed in *K. Siddegowda* v. *Parvathamma*,[73] the presence of a reasonable cause is not sufficient to disprove desertion. Consent of the deceased spouse is also required at the same time. The court, rejecting this argument ruled that even the presence of only one of them disproves desertion.

The burden of proving that there was a reasonable cause for leaving the matrimonial home lies on the party which leaves.[74] The evidence of it must be trustworthy and without any contradictions or discrepancies.[75]

Constructive desertion or wilful neglect

Meaning: As observed in *Tarachand* v. *Narain Devi*,[76] where (*i*) a spouse does not perform his or her marital duties towards the other spouse[77] or (*ii*) does not respect matrimonial rights of the other spouse or (*iii*) spurus at matrimonial services rendered by the other spouse or (*iv*) does not afford opportunities to perform them, the spouse guilty of such conduct is guilty of deliberate or intentional neglect. This is known as *constructive desertion*.

Desertion does not necessarily mean separate living by the parties to the marriage. It can be proved while living under the same roof or in the same house. It is withdrawal from a state of things called "home".[78]

Constructive desertion may contain the characteristics of cruelty. In actual desertion there is forsaking of the *matrimonial home* while in constructive

---

68. *Ramesh Chandra* v. *Padmabai*, (1992) 1 HLR 458 (MP).
69. *Krishnabai* v. *Punamchand*, AIR 1967 MP 200: 1967 Jab LJ 294: 1967 MPLJ 416.
70. *Jagdish Mangtani* v. *Geeta Jagdish Mangtani*, (2003) 1 HLR 286 (Guj).
71. *Madan Mohan Behl* v. *Vinay Behl*, 1978 MLR 194 (Del): 1978 HLR 292.
72. *Bhagwanti* v. *Sadhhu Ram*, AIR 1961 Punj 181: ILR (1960) 1 Punj 579.
73. AIR 1965 Mys 299.
74. *Sanyogta Verma* v. *Vinod Verma*, (1991) 2 HLR 553 (Del).
75. *Sheetal Raju Malhotra* v. *Raju Roopnarain Malhotra*, (2005) 2 HLR 595 (Bom DB).
76. AIR 1967 P&H 300: 77 Punj LR 819: 1975 HLR 435.
77. *Bhavna Advani* v. *Manohar Advani*, (1992) 2 HLR 438 (MP).
78. *Bhagirathabai* v. *Bapurao Devrao*, (1993) 1 HLR 330 (Bom); *C. Venkat Salyanarayan Rao* v. *Chintala Shyamala*, (2003) 2 HLR 237 (AP DB).

desertion there is forsaking of the *matrimonial relationship*. This forsaking of the matrimonial relationship must be accompanied by the *animus deserendi*. It is the neglecting spouse that is solely responsible for constructive desertion.[79]

Desertion is a continuing offence. It becomes complete when the period prescribed by the law ends and when the petition for remedy on its ground is filed. After completion of 2 years a petition can be filed.[80]

Desertion is thus different from cruelty and adultery.

The party who pleads that desertion has ended before the petition was filed has to bear the burden of proving so.

(g) Conversion

On the ground that the other party has ceased to be a Hindu by conversion to another religion a marriage can be dissolved by a decree of divorce.

When one of the spouses voluntarily relinquishes one's religion and adopts another distinctive religion after formal ceremonies it is conversion on his part. From this simple-looking proposition it follows that one should adopt some other major religion which cannot be regarded as Hindu religion. If a Hindu person who is a Jain adopts Buddhism, he is still a Hindu. He cannot be said to have changed his religion.[81] Change from one faith of Hinduism to another does not amount to conversion. Conversion does not of itself result in divorce; a petition under this section is to be made to the court for divorce. Under the ancient Hindu law, the marriage, it being a "sanskar", subsisted even though one of the spouses has changed his religion; but under the codified law, the other spouse who continues to be a Hindu, gets a right under this section to obtain divorce.

Even though a Hindu by birth, if one of the spouses admires Islam or some other major religion or if he professes a theoretical allegiance to some such other religion, he cannot be said to have converted to Islam. Similarly if one declares that he or she has ceased to be a Hindu, that would not afford a ground for relief under this section.

If one spouse ceases to be a Hindu, the marriage continues to be governed by Hindu law and it can be dissolved only under the provisions of the Hindu Marriage Act. However, if both the spouses change their religion and cease to be Hindus, none of them can invoke the aid of this section.

A petitioner who seeks the aid of this ground has to prove the following:

(*a*) That the other spouse has ceased to be a Hindu; and

(*b*) that the other spouse has done so by accepting another religion.

---

79. *Bipinchandra* v. *Prabhavati*, AIR 1952 SCR 838; *Bhavna Advani* v. *Manohar Advani*, (1992) 2 HLR 438 (MP).
80. *Kamla Sharma* v. *Suresh Kumar Sharma*, (2001) 2 HLR 605 (Raj DB); *B.S. Mohankumar* v. *B.K. Nirmala*, (2005) 1 HLR 117 (Kant DB).
81. The word "Hindu" is to be interpreted in the light of S. 2 of the Act.

One must remember that the ground of conversion is not available to the converting spouse; it is the other spouse who remains a Hindu that can avail of this ground if he or she so desires.

It may be that one of the spouses converts to another religion and still however they can retain their marriage. There is nothing in the Act which can prevent them from retaining their marriage.

(h) Insanity or mental disorder

Section 13(1)(*iii*) and the two Explanations attached to it refer to two distinct mental conditions as a ground for divorce:

(*a*) Unsoundness of mind, and

(*b*) mental disorder.

These two conditions are explained by means of Explanations (*a*) and (*b*) which clearly specify that: (*i*) the *unsoundness of mind* must be incurable, and

(*ii*) The *mental disorder* (whether it is continuous or intermittent) must be of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

"*Mental disorder*" means (*i*) mental illness arrested or incomplete development of mind, (*ii*) psychopathic disorder, or (*iii*) any other disorder or disability of mind, (*iv*) and includes schizophrenia.

Some sort of abnormalities on the part of the uneducated wife with incomplete development of mind is not sufficient for the grant of decree of divorce.[82] The expression "*psychopathic disorder*" has been explained as (*i*) a persistent disorder, or (*ii*) disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment.

The sub-section deals with unsoundness of mind which comes in between or occurs in the middle of two ends. The unsoundness of mind must be incurable. Explanation (*b*) speaks that the mental disease has to be (*i*) of a particular kind, and (*ii*) to a particular extent.

"Mental disease" is a very wide term covering and embracing within its fold different phases of unsoundness of mind and mental disorder.[83] Mere branding of a spouse as schizophrenic is not sufficient. The degree of mental disorder of a spouse has to be shown and it should be such that the other spouse cannot reasonably be expected to live with him or her, says the Supreme Court.[84]

---

82. *Veena Rani* v. *Mohinder Kumar*, (2001) 1 HLR 495 (P&H). See also *Seema Arora* v. *Dinesh Kumar Arora*, (2004) 2 HLR 364 (MP DB).
83. For analysis of the expression *see* table in Dr T. Mahmood: *Hindu Law*, p. 109.
84. *Ram Narain Gupta* v. *Rameshwari Gupta*, (1988) 4 SCC 247, 253: AIR 1988 SC 2260; *see* also *Rina Roy* v. *Satish Chandra*, AIR 1982 Cal 138.

Schizophrenia is a mental disease wherein the patient's personality appears to be divided and this personality disintegration which characterises schizophrenia may be of varying degrees.[85]

The burden of proving the incurability of mental unsoundness, mental disorder or psychopathic disorder of the respondent lies on the petitioner.[86] Court can find this out by putting questions to him or her. Intelligible answers will prove that the defendant does not suffer from mental disorder.[87] It has been rightly held in *Santosh* v. *Nandan Singh*[88], that mental disorder cannot be proved by oral testimony of the relations of the parties. Their statements may provide only symptoms but whether or not they are due to a mental disorder can be diagnosed only by a medical expert. Such medical reports should be carefully scrutinized by the court. If a party refuses to submit to medical examination despite an order of the court. Then there is a strong case for drawing an adverse inference against him.[89]

(i) Leprosy

The next ground for divorce is leprosy. The other party must be suffering from virulent and incurable leprosy. The leprosy (lepromatous) if it is contagious, malignant and incurable, satisfies the requirement of the section.[90] The Supreme Court has also held that leprosy as a ground for divorce has to be malignant or venomous.[91]

The section does not mention any minimum duration of the disease for relief under it. There was such a one under the old law, but the amendment of 1976 has removed it.

Modern inventions have made it possible to say whether, in any given case, leprosy is virulent or not, because every form of leprosy is not virulent.

(j) Venereal disease

Venereal disease is a result of intercourse, i.e. it originates from it and may be communicable. Here also the duration of the disease which was a condition before 1976 is removed with the result that if this disease is in a communicable form irrespective of the period for which it existed, it is a ground for divorce.

This ground is a common ground for judicial separation and divorce.

---

85. *Ibid.* See *Satish Kumar Puri* v. *Shashi Bala*, (2004) 1 HLR 89 (P&H); *Harmanjit Kaur* v. *Bhupinder Singh Gill*, (2003) 1 HLR 60 (P&H); *Anita* v. *Har Bhagwan*, (2003) 2 HLR 248 (P&H).
86. *Sharda* v. *Dharampal*, (2003) 4 SCC 493.
87. *Pratap Lal* v. *Kundna*, (1988) 1 HLR 153 (Raj DB); *Seema Arora* v. *Dinesh Kumar Arora*, (2004) 2 HLR 364 (MP DB).
88. (1980) HLR 528 (Del).
89. *Vinita Saxena* v. *Pankaj Pandit*, (2006) 3 SCC 778. Section 114 of the Indian Evidence Act authorizes a court to drawn adverse inference against such party — See *T. Hari Kumar Naidu* v. *Prameela*, (2001) 1 HLR 75 (AP DB).
90. *Annapurna* v. *Nabukishore*, AIR 1965 Ori 72.
91. *Swarajya Laxmi* v. *Padma Rao*, (1974) 1 SCC 581: AIR 1974 SC 165.

(k) Renouncing the world

Renouncing the world by entering any religious order may be termed as ascetic retirement. One should remember that a genuine renunciation is tantamount to civil death. When a person becomes a *Sanyasi* he relinquishes all worldly ties and attachments.[1] This then provides a ground for divorce to the petitioner. The clause enumerates two conditions, namely:

(*i*) renouncing the world, and

(*ii*) entering a religious order.

Both the conditions must be satisfied at a time.[2] Putting on saffron-coloured clothes, shaving one's head and saying that one has become a *Sanyasi* is not sufficient.[3] One must perform the necessary rites and ceremonies prescribed by the religious order, i.e. Shashtras. In other words a proper theological admission into *Sanyas* is necessary.[4]

According to the general belief of Hindu religion, a *Shudra* cannot become a *Sanyasi* or *Yati*. However, if he becomes a *Sanyasi* his or her spouse does not have a cause available for divorce. Some writers[5] are of this opinion but this, it is submitted, is not correct and is of doubtful validity.[6] Persistence of the court in following such a view would amount to discriminating between *Shudras* and non-*Shudras*.[7]

(l) Unheard of for seven years or more

Under the Evidence Act[8] a person who has not been heard of for seven years or more by his close relations, etc. should be presumed to be dead and the burden of proving the contrary lies on him who asserts that he is alive. This is the common law rule. This Act accepts the same rule. The expression "those persons who would naturally have heard of it" could mean such person's (*i*) parents, (*ii*) spouse, (*iii*) children (if any), (*iv*) brothers, (*v*) uncles, (*vi*) any relation by adoption, (*vii*) other close relative, and (*viii*) probably also close friends (if any).

One must note that a decree of divorce granted under this section shall be valid and effective, even if it is discovered later on that the respondent is in fact alive. Such a decree is not a decree declaring the death of the missing or unheard of person; it is at best a decree of presumption of death under Section 8 of the Evidence Act.

---

1. *Baldeo Prasad* v. *Arya Pratinidhi Sabha*, ILR (1930) 52 All 789.
2. *Sital Das* v. *Sant Ram*, AIR 1954 SC 606; *Baldeo Prasad* v. *Arya Prati Nidhi Sabha*, AIR 1930 All 643: ILR 52 All 789: 1930 All LJ 1378; *Kondal Raw* v. *Swamulavaru*, AIR 1918 Mad 402: 33 Mad LJ 63.
3. *Krishnaji Shivaji Pawar* v. *Harnam Reddy Mala Reddy*, AIR 1934 Bom 385.
4. *Satyanarayan Avadhani* v. *Hindu Reli. Jiara Endo. Bd., Chennai*, AIR 1957 AP 824.
5. S.V. Gupte: *Hindu Law of Marriage*, 2nd Edn., (1976), p. 206.
6. T. Mahmood: *Hindu Law*, (1981), p. 112.
7. *Ibid.*
8. S. 108.

(m) Judicial separation decreed

Clause (*i*) of Section 13(1-A) says that whenever a decree for judicial separation is granted and at least one year has elapsed from the date of the decree any one of the spouses may apply for a divorce on that ground provided that there has been no resumption of cohabitation between the parties to the marriage.

The decree referred to above should not be a one passed on the basis of mutual consent of the parties; it should be passed under statutory provisions. This clause does not give any absolute and uncontrolled right to any spouse to obtain a divorce. The court has to be satisfied on points enumerated in Section 23.

Passing of a decree of judicial separation is a must for getting a divorce. Mere living separately is not sufficient.[9] The petitioner should not have taken advantage of his or her position.[10]

(n) Non-restitution of conjugal rights

Clause (*ii*) of Section 13(1-A) as it runs means that when a decree of restitution of conjugal rights is granted by the court against the erring spouse and that erring spouse ignoring the decree does not comply with it until the expiry of at least one year from the date of the decree, divorce can be granted at the instance of either spouse.[11] The decrees of judicial separation and restitution of conjugal rights are made the jumping pads for the petition for divorce at the option of either of the parties to these decrees. The question as to who obtained this decree against whom is irrelevant here.

One must note that if parties resume cohabitation even once, and then again quarrel and move apart, the ground for divorce is lost as it prevents the former decree to ripen into a ground for divorce. But in *Jayanti Mondal case*,[12] the wife stayed at the village house of the husband for four months but there was no cohabitation between them during the period. Therefore the divorce decree was passed for the respondent husband.

(o) Bigamy

The Act has made bigamy an offence (*see* Sections 5, 18). Sub-section (2)(*i*) of Section 13 says that either of the co-wives of a man can seek divorce provided that (*i*) both the wives were married to him before the commencement of the Act and (*ii*) are alive when a petition for divorce is filed, and that (*iii*) both the above said marriages legally exist at the said time.

---

9. *Darshan Prashad* v. *Civil Judge II*, 1992 Supp (2) SCC 87: AIR 1992 SC 967.
10. S. 23, see *Dastane* v. *Dastane*, AIR 1970 Bom 312.
11. *Sneh Prabha* v. *Ravinder Kumar*, 1995 Supp (3) SCC 440: AIR 1995 SC 2170; *Kumud Wadhwa* v. *Mahendra Kumar Wadhwa*, (1998) 1 HLR 325 (P&H DB); *Narayan Shankar Gokhale* v. *Snoha Narayan Gokhale*, (1996) 2 HLR 560 (Bom).
12. *Jayanti Mondal* v. *Shri Tushar Kanti Mondal*, (2005) 1 HLR 112 (Cal DB).

Clear proof of the earlier marriage[13] must be given under this section and mere living as husband and wife is not enough. If one of the wives dies, the other wife cannot apply for a divorce. If the second marriage is void, it cannot become a ground for divorce.

In *Ram Singh* v. *Susilabai*[14], the husband tied a Tali (sacred string) on the hand of another woman. This was done in the presence of a *Shashtri* or *Purohit* (priest). The court held that merely tying a Tali is no proof of a second marriage. Moreover, when the priest did not know Sanskrit how can he perform Saptapadi? Thus the court held that the accused husband did not marry again in the lifetime of the respondent (his wife) for all purposes. Here the law failed to take notice of the intention of the parties involved in bigamy. The law here pays attention only to formalities of the rites. Therefore the court, it is submitted, must take notice of the intention of the parties in the observance of whatever ceremonies they went through at the time of the bigamous marriage. That is, this should be a relevant consideration in judging the charge of bigamy.[15] The Tripura High Court[16] and Calcutta High Court[17] have taken this view. When people living around recognise that a man and a woman live as husband and wife, there arises a strong presumption in favour of the validity of their marriage.

This remedy is available to the wife only.

(p) Rape, sodomy and bestiality[18]

Another additional ground available to the wife is the perversion of the husband in case of sex.

Definition of "rape" as given in the Indian Penal Code holds good here. Forced cohabitation with a wife under 16 years of age, or during judicial separation, may be regarded as rape.[19]

---

13. *Vimla* v. *Vivaswamy*, (1991) 2 SCC 375: (1991) 1 GLH 380; *Shantidev Barman* v. *Kanchan Prabha Devi*, 1991 Supp (2) SCC 616: 1991 Cri LJ 660. *Savitaben Somabhai Bhatiya* v. *State of Gujarat*, (2005) 3 SCC 636: 2005 SCC (Cri) 787: AIR 2005 SC 1809 (at the time of solemnising second marriage, the earlier one was subsisting.); *M.M. Malhotra* v. *Union of India*, (2005) 8 SCC 351: 2005 SCC (L&S) 1139 (Plural marriage-former wife living at the time of second marriage).
14. AIR 1970 Mys 20.
15. *Annual Survey of Indian Law*, (1970), pp. 464-475, citing *Ram Singh* v. *Sushilabai*, AIR 1970 Mys 201.
16. *Ravindra Kumar* v. *Prativa*, AIR 1970 Tripura 30. The Court here referred to *Bhau Rao Shankar* v. *State of Maharashtra*, AIR 1965 SC 1564 and *Kanwal Ram* v. *H.P. Administration*, AIR 1966 SC 614. Other cases referred to were *Phankari* v. *State*, AIR 1965 J&K 105; *Malan* v. *State of Mumbai*, 1960 Bom 393.
17. *R.N. Dutt* v. *State*, AIR 1969 Cal 55.
18. *See* Gandhi: *Indian Penal Code*, (1996), Chap. 16, pp. 428-430.
19. Section 375, Explanation, IPC.

Sodomy is anal intercourse by a man with his wife or with another woman or with a man[20]. Consent of the victim and the victim's age are not relevant considerations here.[21]

Bestiality is sex with an animal.[22]

(q) Maintenance decreed to wife

Where a decree or order has been passed against the husband awarding maintenance to the wife notwithstanding that (*i*) she was living apart and that (*ii*) since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards, a wife on this ground, may present a petition for the dissolution of her marriage by a decree of divorce.

Decree or order of separate residence and maintenance can be obtained, it should be noted, under Section 18 of the Hindu Adoptions and Maintenance Act, 1956,[23] and under Section 125 of the Criminal Procedure Code, 1973. And the policy of law is not to prolong such situations. The law therefore gives such a wife, who obtains such a decree or order, a right to seek divorce if her husband does not resume cohabitation within one year from the date of the decree or order.

When a decree under Section 18 of the Hindu Adoptions and Maintenance Act or an order under Section 125 of the CrPC is passed in the wife's favour, it becomes the duty of her husband to pay maintenance to her and he must resume cohabitation within one year. If the husband fails to do so, the wife can seek divorce. If the husband offers cohabitation and the wife does not respond, she is within her rights; to compel her to respond is to defeat the statutory provision that allows her to live separately without losing maintenance.

(r) Repudiation of marriage by wife

Analysing clause (*iv*) of Section 13(2) it becomes clear that a wife can get divorce if:

(*i*) at the time of her marriage she was below the age of fifteen years, and

(*ii*) after that, but before attaining the age of eighteen years, she has repudiated that marriage.

Consummation of marriage is immaterial here. The Act or the section does not prescribe or lay down any procedure for repudiation of marriage. The fact of repudiation has to be proved therefore by the wife.

---

20. *See* Section 377 of IPC.
21. *K. V. Revanna* v. *Suseelamma*, AIR 1967 Mys 165: (1966) 1 Mys LJ 44 (expression of mere desire for sodomy is not a ground for divorce).
22. See Section 377 of IPC.
23. A chaste Hindu wife can enforce her right to live separate from her husband and have her right to maintenance too in fact on the following grounds (or acts done by her husband): (1) desertion, (2) cruelty, (3) leprosy, (4) bigamy, (5) concubinage, (6) conversion, and (7) any other ground justifying separate living (S. 18, Hindu Adoptions and Maintenance Act, 1956).

One important point, one must remember here, is that the Act indirectly accepts that a minor's marriage is not void (though penal). Because, if it was void, the question of allowing a divorce should not arise.

(s) Divorce and Judicial Separation: Distinction

Divorce	*Judicial Separation*
(1) Divorce is a dissolution of marriage. It puts an end to the marital rights and obligations between the parties.	(1) Rights and obligations of parties are temporarily suspended.
(2) Marital relationship comes to an end.	(2) Marital relationship does not come to an end.
(3) Parties can remarry after one year from the date of decree.	(3) Parties cannot remarry unless after a lapse of one year's time a decree of divorce is obtained.
(4) Act of resumption of cohabitation by the parties after the decree of divorce does not have any effect on the decree.	(4) Resumption of cohabitation by the parties during the course of a decree of judicial separation neutralises the decree.
(5) In the case of a petition for divorce it must be proved that the respondent was living in adultery at the time of making of the application.	(5) In the case of a petition for judicial separation a single or solitary act of adultery committed after marriage would be sufficient to obtain the decree.
(6) It is to be shown that— (*i*) there was no resumption of cohabitation for a period of one year after the decree of judicial separation; or (*ii*) there was no restitution of conjugal rights for one year after passing of the decree for restitution of conjugal rights; or (*iii*) the respondent is unheard of for a period of seven years or more, or (*iv*) the respondent has renounced the world by entering any religious order.	(6) Desertion of petitioner by respondent continuously for not less than two years immediately preceding the presentation is sufficient.

(t) Alternative relief in divorce proceedings [Section 13-A]

(*i*) ***Court's discretion***.—Under this section, the court in a petition for divorce is empowered to grant, subject to some exceptions, a decree for judicial separation instead of a decree for divorce.[24] But in *Trupti Das case*,[25] it has been held that the court cannot grant judicial separation in a petition for divorce *suo moto*. In this case the High Court is an appeal granted a decree of judicial separation *suo moto*. No case was filed for this. The Supreme Court held that the H.C. was not justified in granting a decree for judicial separation. The section puts certain conditions on a court to exercise its discretionary power:

(*i*) There must be a petition for divorce before the court.

(*ii*) The court must formulate an opinion that it is just to grant a judicial separation instead of a decree for divorce.

(*iii*) The court must come to this opinion on the grounds of the circumstances of the case.

And what may be such circumstances?

Such circumstances are—(*a*) The disability of the respondent (*b*) the wrong done by him to the petitioner, (*c*) chances of reconciliation between the parties, (*d*) interest of the parties, and (*e*) interest of the children.

(*ii*) ***No discretion***.—However, when in a petition for divorce the respondent (*a*) has ceased to be a Hindu and has converted to some other religion — Section 13(1)(*ii*), or (*b*) has renounced the world by entering another religious order — Section 13(1)(*vi*), or (*c*) has been unheard of for a period of seven years or more — Section 13(1)(*vii*) the court has no discretion but to grant divorce.

(u) Divorce by mutual consent [Section 13-B]

As ordinarily understood, divorce is nothing more nor less than another name for dissolution of marriage, whether the same results from the act of parties or is a consequence of the proceedings at law, and it would be wrong to regard the two terms as not being synonymous with each other, unless the legislature makes a direction to the contrary.[26]

Section 13-B introduces a revolutionary concept of "divorce by mutual consent".[27] But it must not be considered that such a divorce was unknown to Hindu law.[28]

The section is retrospective.

---

24. *Adya* v. *Anuradha*, AIR 1980 Kant 8.
25. *Trupti Das* v. *Rabindranatha Mahapatra*, (2005) 11 SCC 533.
26. *Zohara Khatoon* v. *Mohd. Ibrahim*, (1981) 2 SCC 509: 1981 SCC (Cri) 517: AIR 1981 SC 1243: (1981) Cri LJ 754.
27. *Inserted* by the Marriage Laws (Amendment) Act, 1976 and makes the same reading as Section 28 of the SMA, 1954. Both are in *pari materia*. *Sureshta Devi* v. *Om Prakash*, (1991) 2 SCC 25.
28. It was permitted by the Travancore Exhara Act, 1100 (1925 BC), The Travancore Act, 1925 (Reg. III of 1100), the Cochin Marumakkattayam Act, 1133 (1938 BC) and the Cochin Nayar Act, 1113 (1938 BC). In certain communities it was provided by custom-see *Jina Magan Pakhali* v. *Rai Jethi*, AIR 1941 Bom 298: ILR 1941 Bom 535.

(*i*) ***Requirements of the section.***—The section requires the following:

(*i*) that both the parties together should present a petition to the court [Section 13-B(1)];

(*ii*) that they should wait for at least six months from the date they present a petition [Section 13-B(2)][29];

(*iii*) that the parties may withdraw their petition during this time;

(*iv*) that before the expiry of eighteen months they together should make a motion to the court for passing a decree;

(*v*) that after due inquiries the court shall pass a decree.

(*ii*) ***Grounds of petition.***—

(*i*) that the parties are living separately for a period of one year or more before the presentation of the petition;

(*ii*) that they have not been able to live together; and

(*iii*) that they have mutually agreed that the marriage should be dissolved.

In such a case it is not for the court to inquire into the reasons as to why the parties are not able to live together and why they want a divorce. Doing so would be against the very spirit and principle of divorce by mutual consent.

(*iii*) ***Consent.***—However, one important point to be remembered here is that the consent required for a divorce petition must be free, meaning thereby that it has not been obtained by force, fraud or undue influence.[30]

(*iv*) ***Withdrawal of consent.***—As observed by the Supreme Court[31] if the subsequent motion seeking divorce decree under sub-section (2) is not of "both the parties" because of withdrawal of consent by one of the parties, the court gets no jurisdiction to pass the decree. Mutual consent, therefore, should continue till passing of the decree. A party to such a petition, it follows, can unilaterally withdraw his/her consent at any time till the passing of the divorce decree.

In this case[32] the court explained the meaning of the expressions "living separately" and "have not been able to live together". Living separately means not having conjugal relationship even if living under the same roof. The latter expression indicates that it is a brokendown marriage with no possibility of reconciliation.

On presentation of the joint motion as said in Section 13-B(2) the court may make inquiries and hear and examine both the parties to ascertain that the averments made in the divorce petition were true and that the consent of the

---

29. *Sailaya, In re*, AIR 1995 AP 325. This provision is to guard against hasty decisions but of late there is a clear judicial inclination to dispense with this period of 6 months if the circumstances of the case so demand. See in this regard *Gandhi Venkata Chitti Abbai, In re*, AIR 1999 AP 91. See also *Malwinder Kaur* v. *Devinder Pal Singh*, AIR 2003 P&H 199.

30. *See* Section 23(1)(*b*). *Maunesh* v. *Anasuyamma*, (2002) 1 HLR 58 (Kant).

31. *Sureshta Devi* v. *Om Prakash*, (1991) 2 SCC 25, 31; 1991 SCC (Cri) 292; (1991) 1 GLH 440; 1991 Mah LJ 324.

32. *Ibid.*

parties were not obtained by force, fraud or undue influence as is laid down in Section 23(1)(*bb*).[33]

Can one of the parties withdraw his or her consent unilaterally at a later stage of a divorce petition? Can a court proceed to grant a decree of divorce by mutual consent after such withdrawal? These questions arose in various cases and the opinions of the High Courts differed: One favouring the view that the consent must continue till passing of the decree and the other disfavouring the first view. This point is, however, set at rest by the Supreme Court in *Sureshta Devi case*[34].

(*v*) ***Irretrievable breakdown of marriage.***—In *Surestha Devi's case*[35] the court observed that purpose of putting the petition in the cold storage is that the parties may reflect on their move and change their mind. This change need not be in the mind of both the parties. It may be in that of one party. The mutuality of consent should continue till the divorce decree is passed.

Withdrawal of consent must be by a positive act.

It is possible that the party withdrawing consent has taken an advantage in cash or kind by the compromise for divorce by mutual consent. Can these advantages be recovered. In *Hemant Kumar V. C. Sukharia* v. *Paruben*,[36] the wife had taken Rs 40,000 and 10 tolas of gold from the appellant for settlement of divorce under Section 13-B. Later on she withdrew her consent. The court said that no divorce could be granted. Husband demanded return of items but the court said that there is no provision under the HMA or any other Act which empowers the court to grant the relief to the husband. He can have recourse to appropriate legal remedies under the law for the return of the items.

But a question may be raised against this attitude of the court and that is "Instead of driving parties to more litigation in some other court and under some other law, the court can exercise its discretion under Section 151 of the CPC to pass a just order and it would be in consonance with the spirit of Section 21-B of the Act.[37]

(*vi*) **Theories of Divorce.**—There are various theories regarding divorce, such as:

(1) Divorce at will theory;

(2) Frustration of marriage theory;

(3) Guilt or offence theory;

(4) Indissolubility of marriage theory;

---

33. *Sureshta Devi* v. *Om Prakash*, (1991) 2 SCC 25, 31: 1991 SCC (Cri) 292: (1991) 1 GLH 440: 1991 Mah LJ 324.
34. *Ibid.*
35. (1991) 2 SCC 25. See also court's observations in *Ashok Hurra* v. *Ranga Bipin, Zaveri*, (1999) 4 SCC 226.
36. (1992) 2 HLR 382 (Guj) (para 12).
37. *Modern Hindu Law*, p. 258.

(5) Irretrievable breakdown of marriage theory;

(6) Mutual consent theory.

(1) Divorce at will theory

According to this theory one can divorce one's spouse whenever one pleases. This theory is therefore called a discredited theory. Infact marriage is more difficult than divorce but here the case is quite reverse. Mohammedan law recognizes this theory and a husband at his free will, without consulting anybody, and without anybody's assistance can divorce his wife. This type of divorce is not open for Muslim woman. However if both the parties were given such freedom what would have been its result!

Where marriage is unbreakable it becomes a life long prison if divorce cannot be give. Similarly, where marriage subsists during the pleasure of one party, it becomes a plaything in the hands of the party entitled to proclaim divorce at will. In both the cases there is arbitrariness and open disregard of the sentiments and love of the other party.

Hindu Shastric law recognised the first theory. The HMA gives no room to the Second Theory.

(2) Frustration of marriage theory

Without there being any marital offence and marriage is frustrated when one of the spouses is suffering from any physical ailment, or mental unsoundness of mind, or has changed his religion or has renounced the world or has disappeared for a very long period. In such a case the other spouse should be free to put an end to the marriage by getting divorce. The HMA recognises these grounds as being good for divorce.

(3) Guilt or Offence theory

When one of the spouses commits a matrimonial offence. The other may seek divorce from the delinquent spouse. The expression matrimonial offence is important, it includes (1) adultery, (2) desertion, (3) Cruelty, (4) Rape, (5) Sodomy, (6) Bestiality, (7) Refusal to obey court's order to pay maintenance to the wife, (8) Marrying an underage person. Offences other than these[38] do not provide a ground for divorce. In other words there should be personal injury to the marital relations of the spouses, not any other injury.

The Marriage Laws (Amendment) Act, 1976 has made a radical amendment and grounds of divorce are increased and some special grounds for divorce are given to the wife.

(4) Indissolubility of marriage theory

Marriage is a union of bone with bone and flesh with flesh, it is an unbreakable tie, an eternal tie — so say the Shashtras. In those time divorce

38. i.e. murder, dacoity, cheating, theft, treason, smuggling, hoarding, blackmarketing, bribery etc.

was an anathema. But this was the law for the so called upper three castes.[39] The Hindu Marriage Act has not accepted this position and marriage is now no longer an unbreakable tie or a prison. If the necessary conditions given under Sections 13 and 13-B exist, any Hindu is entitled to the dissolution of his or her marriage. The HMA has therefore made a revolutionary change in this regard.

(5) Irretrievable breakdown of marriage theory[40]

A marriage is a union of husband and wife for the whole life, but it may happen that their relations might be strained and they would like is live away from each other. It is to be remembered that owing to their sexual relations, interdependence and social censure it is difficult for them to live without each other for a long time. Therefore there must be some stronger reason for them to live apart and get divorce. There should be complete absence of emotional attachment between them and there must develop intense hatred and acrimony between them, so much so, that their marriage is only in name, a dead one or like a shell sans substance. It now beyond the hope of salvage. It is therefore an irretrievable breakdown of marriage.

In *Jorden's case*,[41] the Supreme Court of India advocated that irretrievable breakdown of marriage be added as a ground for divorce, but no serious steps were taken.[42] The Delhi High Court was not in favour of such addition of ground as according to it a Hindu marriage cannot be dissolved on this ground.[43] In *Chetan Das* v. *Kamlabai*[44] also this theory of irretrievable breakdown of marriage was not applied and divorce was not granted.

However in *Kalidas* (*Ghosh*) v. *Ashish Kumar Das case*[45], the court had noted the basic ingredients of such a marriage which are as under:

(*i*) Both the parties are equally indulging in cruel behaviour, physical or mental against each other.

(*ii*) It is not possible for the court to come to any definite conclusion about the role or responsibility of one particular spouse in creating and sustaining the bitterness.

(*iii*) Marital relationship is emotionally dead and neither of the spouses genuinely wants to live with the other spouse.[46]

---

39. Brahmin, Kshatriya and Vaishya.
40. *See* also 48 JILI (2006) 439-444 an article by Jaya V.S.: *Irretrievable Breakdown of Marriage As An Additional Ground For Divorce.*
41. *Jorden Diengdeh* v. *S.S. Chopra*, (1985) 3 SCC 62: AIR 1985 SC 935.
42. A Bill prepared for this purpose was abandoned.
43. *Bhatnagar* v. *Bhatnagar*, AIR 1989 Del 121; *Nitu* v. *Kishanlal*, AIR 1990 Del 1.
44. (2001) 4 SCC 250: AIR 2001 SC 1709; *Shyam Sunder Kohli* v. *Sushma Kohli*, (2004) 7 SCC 747: (2004) 114 DLT 1; *A. Jayachandra* v. *Aneel Kaur*, (2005) 2 SCC 22: AIR 2005 SC 534.
45. (2004) 1 HLR 448, para 53 (Cal DB).
46. In *Dilip Kumar Karmakar* v. *Biju Rani Karmakar*, (2004) 1 HLR 630, para 25 (Cal DB), This concept is reiterated by Pradip Ray J. of Calcutta High Court.

Some theorists are in favour of grant of divorce on this ground. Another revisor of the Modern Hindu law rightly points out[47] that the first two ingredients are not sine qua non of irretrievability of marriage, what is important and a must is that matrimony is emotionally dead.

This theory is subscribed by the Law Commission of India[48] and the Supreme Court. The Law Commission says that it is good to give a *de jure* recognition to what exists *de facto*. It is not a relevant consideration for granting divorce on the ground of irretrievable breakdown as to which party played the villan's role leading to such breakdown. Hence section 23(1)(*a*) will not apply to such a petition.

Jorden Diengdeh case[49] is the first case wherein the Supreme Court made recommendations to make irretrievable breakdown of marriage as a ground for divorce. From this case up to *Navin Kohli's case*[50], in a number of cases such recommendations were reiterated. Nothing further than recommendations could be done. Therefore in *V. Bhagat* v. *D. Bhagat*, [51] the Supreme Court invoked its power under Article 142 of the Constitution and granted divorce. Thereafter in a few more cases where the marriage was found dead emotionally and practically, it granted divorce.[52] It has been argued that High Courts do not possess the power conferred on the Supreme Court by Article 142; They are bound by the statutory provisions which do not allow divorce on this ground.[53] But this obstacle should be remedied.

(6) Divorce by Mutual Consent theory

Divorce by mutual consent means that the case is not like usual ones wherein one party petitions against the other for divorce and the other party resists the same. Here both the parties make a joint petition to the court for divorce between them. The genuinely desire to get rid of each other and they part amicably for good. If divorce is not given their life would be spoiled and it would result in moral degradation. If divorce by mutual consent is given the parties will not wash their dirty linen in public.

There are unfounded objections against this type of divorce that consent of the unwilling party would be obtained by force fraud or some other contrivance, and this is a divorce by collusion. But both these arguments and doubts are unfounded. Every collusion is no doubt by consent but every consent does not

---

47. At Ch. 4, (S. 13-B) p. 268.
48. In its 71st Report (1978).
49. *Jorden Diengdeh* v. *S.S. Chopra*, (1985) 3 SCC 82: AIR 1985 SC 935.
50. (2006) 4 SCC 558: (2006) 1 HLR 407. See *Ram Babu Babeley* v. *Sandhya*, (2006) 1 HLR 424 (cases discovered and analysed).
51. (1994) 1 SCC 337.
52. *Ramesh Chander* v. *Savitri*, (1995) 2 SCC 7: AIR 1995 SC 851; *Ashok Hurra* v. *Rupa Bipin Zaveri*, (1997) 4 SCC 226: AIR 1997 SC 1266.
53. *Anil Kumar* v. *Sunita*, (1988) 1 DMC 345 (Guj); *Gaurishankar Chakravarthy* v. *Basana Ray*, AIR 1999 Gau 48: (1998) 2 DMC 630; *Mayawanti* v. *Bina Ram*, (2004) 2 HLR 323 (P&H); *Kusum* v. *R.K. Saxena*, (2004) 2 HLR 248; *Suresh Sharma* v. *Sukhdev Sharma*, (2006) 1 HLR 416 (HP); *Dipak Kumar Sarkar* v. *Sima Sarkar*, (2005) 1 HLR 730 (Cal DB).

mean collusion. Collusion is a secret agreement for a fraudulent purpose; it is a secret agreement by two or more persons to obtain an unlawful object.[54] Collusion is different from compulsion. Compulsion occurs when one party can dominate the will of the other.[55]

The HMA now permits divorce under Section 13-B. One may well say that from an unbreakable bondage under the Smritis, a Hindu Marriage has been transferred under the HMA into a consensual union between one man and one woman. Everything stataic must droop and die and ideas of marriage and divorce are no exception.

(v) Divorce petition: When presented [Section 14]

The section says that within the first year of the marriage no divorce petition should be entertained by any court. [Section 14(1)]

Two weighty reasons[56] appear for this provision. The first reason is that if such provision is not there, divorces would be encouraged. The second reason is that no haste should be made because haste is waste and therefore one year's time after marriage is a reasonable time for the spouses to make up their differences and come to terms. The period of one year is to be counted from the date of the marriage.

The section however lays down the following exceptions to the above rule under which a petition for divorce may be presented [proviso to Section 13(1)]:

(*i*) on the ground of "exceptional hardship" to the petitioner;[57] or

(*ii*) on the ground of "exceptional depravity" on the part of the respondent.

Of course, the above two terms are not defined by the Act.

The court while considering the application must first consider—(1) The reasonable probability of reconciliation between the parties, and (2) the interest of children (if any) of the marriage [Section 14 (2)].[58]

Misrepresentation or concealment of the nature of the case will result in dismissal of the petition or a conditional decree as laid down in the proviso.

Section 14 is applicable to a petition for divorce by mutual consent under Section 13-B also.[59]

---

54. P. Ramanath Aiyar: *Concise Law Dictionary*, 3rd Edn., (2006), pp. 204, 205.
55. *V.S. Rahi* v. *Ram Chambali*, AIR 1984 SC 595, 599, See *Tirukappa* v. *Kamalamma*, AIR 1966 Mys 1, 4. — Hindu Marriage Act, 1955, S. 23(1)(c).
56. *Meganatha Nayagar* v. *Susheela*, AIR 1957 Mad 423.
57. *Meghanath Nayagar* v. *Susheela*, AIR 1957 Mad 423; 70 Mad LW 815. (Respondents first marriage with a Shudra girl and having a son from such marriage); *G.G. Padma Rao* v. *Swarajya Lakshmi*, AIR 1970 AP 300 (Respondents incurable and virulent leprosy before marriage was concealed)
58. Cases: (1) Interest of children: *Deepa Devi* v. *Dhiraj Kumar Singh*, (2006) 1 HLR 378 (Jhar); (2) Prospects of reconciliation: *Bowman* v. *Bowman*, (1949) 2 All ER 127; 1949 LJR 1416 (CA).
59. *Tarven Kumar Vaish* v. *Meena Kshi Vaish*, (2005) 2 HLR 540 (Del).

(w) When divorced persons may remarry [Section 15]

Remedy of divorce is an extreme remedy in the area of marriage; it is not a contrivance to make room for the spouses to marry again. Before 1976 there was a prescribed limit of one year after the date of decree in the first instance, after which a spouse could remarry. However the Amended Act removes that limit and consequently the present rule is that after a decree of divorce either party can marry again as and when he/she pleases, but in that case,

(*i*) there should not be any legal right of appeal against the original decree, or

(*ii*) if such right is there, the time for appealing should have expired or without any appeal having been preferred, or

(*iii*) if an appeal is presented, but it is dismissed.

If an appeal is allowed reverting the original decree, there cannot arise any question of remarriage. Similarly neither party can remarry when an appeal is pending. This may be termed as a waiting period within which no remarriage is allowed.

In *Prakash Chand Sharma case*[60] the husband continuously denied access to his wife and he remarried during the pendency of the second appeal preferred by his wife against the decree of divorce. The Supreme Court decided that husband's remarriage, even though it was only 3 days earlier, was hit by Section 15. The husband cannot be given the benefit of his wrong. Moreover looking from the point of view of equity one who comes into equity must come with clean hands, and the hands of the husband not being clean, his remarriage was hit by Section 15.

If the parties to divorce decide to remarry each other again, they can do so. A muslim woman need not walk the course of Halala as prescribed by the Muslim law.[61]

For Sections 16, 17, 18 *see* note 31 *infra*.

[F]

JURISDICTION AND PROCEDURE

21. TEXT: SECTIONS. 19 TO 28-A

19. *Court to which petition shall be presented.*—Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction—

(*i*) the marriage was solemnized, or

(*ii*) the respondent, at the time of the presentation of the petition resides, or

(*iii*) the parties to the marriage last resided together, or

---

60. *Prakash Chand Sharma* v. *Vimlesh*, 1995 Supp (4) SCC 642.

61. *Rashid Ahmed* v. *Anisa Khatun*, AIR 1932 PC 25: (1932) 59 IA 21. A Muslim woman who has been divorced by her husband (Talaq) can remarry only when (1) she is remarried to another person; (2) There is actual consummation of the second marriage; (3) The second husband divorces her or is dead. It must be said that this rule of Halal is violative of right to personal liberty guaranteed by Article 21 of the Constitution.

(*iv*) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of him if he were alive.

20. *Contents and verification of petitions.*—(1) Every petition presented under this Act shall state as distinctly as the nature of the case permits the facts on which the claim to relief is founded, [and except in a petition under Section 11, shall also state] that there is no collusion between the petitioner and the other party to the marriage.

(2) The statements contained in every petition under this Act shall be verified by the petitioner or some other competent person in the manner required by law for the verification of plaints, and may, at the hearing, be referred to as evidence.

21. *Application of Act 5 of 1908.*—Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908.

21-A. *Power to transfer petitions in certain cases.*—(1) Where—

(*a*) a petition under this Act has been presented to a district court having jurisdiction by a party to a marriage praying for a decree for judicial separation under Section 10 or for a decree of divorce under Section 13, and

(*b*) another petition under this Act has been presented thereafter by the other party to the marriage praying for a decree for judicial separation under Section 10 or for a decree of divorce under Section 13 on any ground, whether in the same district court or in a different district court, in the same State or in a different State.

the petitions shall be dealt with as specified in sub-section (2).

(2) in a case where sub-section (1) applies,—

(*a*) if the petitions are presented to the same district court, both the petitions shall be tried and heard together by that district court;

(*b*) if the petitions are presented to different district courts, the petition presented later shall be transferred to the district court in which the earlier petition was presented and both the petitions shall be heard and disposed of together by the district court in which the earlier petition was presented.

(3) In a case where clause (*b*) of sub-section (2) applies, the court or the Government, as the case may be, competent under the Code of Civil Procedure, 1908 (5 of 1908), to transfer any suit or proceeding from the district court in which the later petition has been presented to the district court in which the earlier petition is pending, shall exercise its powers to transfer such later petition as if it had been empowered so to do under the said Code.

[21-B. *Special provision relating to trial and disposal of petitions under the Act.*—(1) The trial of a petition under this Act, shall, insofar as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion unless the court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(2) Every petition under this Act shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date of service of notice of the petition on the respondent.

(3) Every appeal under this Act shall be heard as expeditiously as possible, and endeavour shall be made to conclude the hearing within three months from the date of service of notice of appeal on the respondent.

21-C. *Documentary evidence.*—Notwithstanding anything in any enactment to the contrary, no document shall be inadmissible in evidence in any proceeding at the trial of a petition under this Act on the ground that it is not duly stamped or registered.]

[22. *Proceedings to be in camera and may not be printed or published.*—(1) Every proceeding under this Act shall be conducted *in camera* and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees.]

23. *Decree in proceedings.*—(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that—

(*a*) any of the grounds for granting relief exists and the petitioner [except in cases where the relief is sought by him on the ground specified in sub-clause (*a*), sub-clause (*b*) or sub-clause (*c*) of clause (*ii*) of Section 5] is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(*b*) where the ground of the petition is the ground specified [* * *] in clause (*i*) of sub-section (1) of Section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

[(*bb*) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence; and]

(*c*) the petition [not being a petition presented under Section 11] is not presented or prosecuted in collusion with the respondent, and

(*d*) there has not been any unnecessary or improper delay in instituting the proceeding, and

(*e*) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties:

Provided that nothing contained in the sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (*ii*), clause (*iii*), clause (*iv*), clause (*v*), clause (*vi*) or clause (*vii*) of sub-section (1) of Section 13.

(3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any persons, with directions to report to the court, as to whether reconciliation can be, and has been, effected and the court shall in disposing of the proceeding have due regard to the report.

(4) In every case where a marriage is dissolved by a decree of divorce, the court passing the decree shall give a copy thereof free of cost to each of the parties.]

23-A. *Relief for respondent in divorce and other proceedings.*—In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground; and if the petitioner's adultery, cruelty or desertion is proved, the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground.

24. *Maintenance pendente lite and expenses of proceedings.*—Where in any proceeding under this Act it appears to the court that either the wife or the husband, as

the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly expenses during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable:

Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be.[62]

25. *Permanent alimony and maintenance.*—(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall [* * *] pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant[, the conduct of the parties and other circumstances of the case, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, [it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just.]

26. *Custody of children.*—In any proceeding under this Act, the court may, from time to time, pass such interim orders and, make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, alter the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may, also from time to time revoke, suspend or vary any such orders and provisions previously made.

Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.[63]

27. *Disposal of property.*—In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife.

28. *Appeal from decrees and orders.*—(1) All decrees made by the court in any proceeding under this Act shall, subject to the provisions of sub-section (3), be applicable as decrees of the court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

---

62. Proviso *inserted* by the Marriage Laws (Amendment) Act, 2001 (w.e.f. 24-9-2001).
63. Proviso *inserted* by the Marriage Laws (Amendment) Act, 2001 (w.e.f. 24-9-2001).

(2) Orders made by the court in any proceeding under this Act, under Section 25 or Section 26 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of thirty days from the date of the decree or order.

28-A. ***Enforcement of decrees and orders.*****—All decrees and orders made by the court in any proceeding under this Act shall be enforced in the like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction for the time being are enforced.**

22. JURISDICTION OF COURTS, PETITION AND APPLICATION OF CIVIL PROCEDURE CODE, 1908 [SECTIONS. 19, 20 and 21]

Every petition under this Act shall be presented to the district court within the local limits of whose ordinary civil jurisdiction—

(*i*) the marriage was solemnized; or

(*ii*) the respondent at the time of the presentation of the petition *resides*; or

(*iii*) the parties to the marriage last *resided*; or

(*iv*) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent—

(*a*) is at that time residing outside the territories to which this Act extends, or

(*b*) the presumptive death of the respondent is claimed.

These four may be termed as the options given to the petitioner to present his petition at a particular place in a given situation. But they may not mean four different places; sometime all of them or some of them may mean the same place and the same court. Where these places are different the petitioner has a right to choose.

Word "marriage" means the "marriage of the petitioner". The actual meaning of the word "resided" is yet not settled. Does "residing" mean living together temporarily or permanently? Does it mean they should Cohabit? Does a casual visit mean " residing"? The Delhi High Court in *Renu Vij* v. *Surinder Kumar*[64] rejected the extended meaning tried to be given to the expression "last resided together" as meaning that parties should have had marital intercourse during the period they resided together. In this case the wife came to reside in the matrimonial home for a short duration and no marital intercourse took place as the wife was suffering from some mental disorder. The court held that the court where the matrimonial home was situate had the jurisdiction.

In its ordinary sense "residence" is more or less of a permanent character. The expression "resides" means to make an abode for a considerable time; to

---

64. AIR 1986 Del 33.

dwell permanently or for a length of time; to have a settled abode for a time. It is the place where a person has a fixed home or abode. Where there is such fixed home or such abode at one place, his legal and actual place of residence is the same and he cannot be said to reside at any other place where he had gone on a casual or temporary visit. But if he has no established home, his actual and physical habitation is the place where he actually or personally resides.

The word "resides" in the context of Section 19(*ii*) denotes the actual place of residence of the party concerned at the commencement of the proceedings and not the place of origin.

From the facts of the case it is clear that the appellant-wife came to reside with the respondent-husband in Delhi and her actual residence at the time of filing the petition by her husband being Delhi, the District Court, Almora had no jurisdiction under Section 19(*ii*) to entertain the petition.[65]

Section 20 relates to contents and verification of a petition. It lays down guidance as to three things, i.e.—

(*i*) about the contents of the petition;

(*ii*) about its verification; and

(*iii*) about its evidentiary valūe.

The petition shall state distinctly

(*a*) the facts on which the claim is founded, and;

(*b*) that there is no collusion between the parties—*see* also Section 23(1)(*c*).

Section 21 states about the applicability of the Code of Civil Procedure[66] to all proceedings under this Act.

23. POWER TO TRANSFER PETITIONS [SECTION 21-A] AND TRIAL, DISPOSAL [SECTION 21-B], EVIDENCE [SECTION 21-C] AND PROCEEDINGS [SECTION 22]

If both the parties to a marriage present petitions to the same district court, or in different district courts in the same State or in a different State[67] for judicial separation or divorce:

(*i*) if petitions are presented to the same district court, both the petitions could be heard and tried together by that district court;

(*ii*) if they are presented to different district courts, the subsequent petition is to be transferred to the district court wherein the earlier one is filed, and that court will decide it (Section 21-A).

---

65. *Jeewanti Pandey* v. *Kishan Chandra Pandey*, (1981) 4 SCC 517.
66. *See* S. 100 (Appeals), S. 151 (inherent powers of the court), Order VII, Rules 1 and 7 and Order IX Rules 8, 9 and 13 of CPC.
67. *Amita Laxmi Narayan Singh* v. *Laxmi Narayan Singh*, (1992) 2 SCC 562: AIR 1992 SC 1148; *Prabha* v. *R. Parkash Kalra*, 1987 Supp SCC 339.

In *Narasimha Rao* v. *Venkata Lakshmi*,[68] arose the issue of recognition of a foreign divorce decree. The Supreme Court evolved the following rules on the basis of interpretation of Section 13 CPC in conformity with public policy, justice, equity and good conscience.[69]

(*i*) The judgment must have been pronounced by a court of competent jurisdiction;

(*ii*) The judgment must be based on merits;

(*iii*) The decision should be a result of contest between the parties;

(*iv*) It should not be based on refusal to recognise the Indian law where it is applicable;

(*v*) The proceeding in which the judgment is obtained should not be opposed to natural justice and

(*vi*) The judgment is not obtained by fraud.[70]

Sections 21 and 21-A, of the Act do not exclude the Supreme Court's jurisdiction under Section 25 of the Civil Procedure Code to entertain an application for transfer of suit filed under the Hindu Marriage Act.[71]

Section 21-B provides that the trial of a petition under this Act shall, so far as is practicable; consistently with the interests of justice in respect of the trial (*i*) be continued from day to day until its conclusion unless some adjournments are necessary. (*ii*) The petition is to be tried expeditiously and shall be concluded within six months from the date of service of the notice to the respondent. (*iii*) An appeal is to be disposed of within three months from the date of service of the notice of the appeal on the respondent. The above rules (*i*) and (*ii*) are addressed to the lower courts and not to the appellate courts.

In matrimonial proceedings the court is required to play a role different from that in the trial of an ordinary civil suit and therefore it has to facilitate substantial justice to the parties by ascertainment of the truth which it can do by admitting documents in evidence even though they are not duly stamped or not duly registered (Section 21-C). Thus this provision which is mandatory takes away from the courts the discretion about admitting or not admitting certain documents.

Section 22 enjoins that proceedings under this Act shall be in camera irrespective of the wishes of the parties [Section 22(1)].[72] The second mandate is that no matter regarding proceedings of such case could be printed or published by anyone except with the previous permission of the court. Violation of this mandate is punishable with a fine up to Rs 1000. [Section 22(2)].

---

68. (1991) 3 SCC 451.
69. *Ibid.* para 10.
70. See *Satya* v. *Teja Singh*, (1975) 1 SCC 120: AIR 1975 SC 105.
71. *Guda Vijay Lakshmi* v. *Guda Ramachandra Shekhar Sastry*, (1981) 2 SCC 646: 1981 SCC (Cri) 574.
72. *Gobind* v. *State of M.P.*, (1975) 2 SCC 148. See also *Sridhar* v. *Sukanya*, (2005) 1 HLR 739 (Mad) — (if publication is allowed it would frustrate the purpose of in camera trial.)

24. DECREE AND RELIEF [SECTIONS. 23 and 23-A]

Section 23 has four clauses. Clause (1) has six sub-clauses—1(*a*), 1(*b*), 1(*bb*), 1(*c*), 1(*d*), 1(*e*). Sub-clause (*a*) of Section 23(1) requires that—

(*a*) the grounds for granting the relief or at least one of these grounds must exist, and

(*b*) where the petition is on the ground of (*i*) incapacity to give a valid consent, or (*ii*) mental disorder, or (*iii*) insanity of the respondent [Section 5(*ii*)(*a*), Section 5(*ii*)(*b*), Section 5(*ii*)(*c*)] and the petitioner is not taking advantage of his own wrong or disability, the court shall decree such relief.

According to sub-clause (1)(*b*) where the petition is on the ground of adultery [Section 13(1)(*i*)] and the petitioner is not an accessory to or is not conniving at or condoning the act or acts complained of or where the petition is on the ground of cruelty and the petitioner has not condoned it, the court shall grant the relief accordingly.

Similarly as per sub-clause (1)(*bb*) where divorce by mutual consent is prayed for and where such consent is not obtained by force, fraud or undue influence; and where as per sub-clause (1)(*c*) the petition is not made or prosecuted in collusion with the respondent and where there is not any unnecessary delay in institution of the proceedings [sub-clause (1)(*d*)] and finally where there is no other legal ground why relief should not be granted [sub-clause (1)(*e*)], the court shall grant the relief accordingly.

The court in such cases is duty-bound to make every endeavour to bring about a reconciliation between the parties [Section 23(2)], except where the relief is sought on grounds contained in Section 13(1), clauses (*ii*) to (*vii*).

It can appoint a conciliator under Section 23(3) and a copy of the decree passed by the court shall be supplied free of cost by the court to each of the parties. [Section 23(4)]

The general bar contained in Section 23(1)(*a*) seems to have been based on the maxim of Equity that one cannot be allowed to take advantage of his own wrong.[73] The rest of the sub-clauses also contain such bars.

The term "wrong" under Section 23(1)(*a*) has to be something more than mere disinclination to agree to an offer of reunion: it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled.

Hence a husband refusing to cohabit with his wife for a year or more despite a consensual, but non-collusive, decree of conjugal rights against him cannot be said to take advantage of his own wrong under Section 23(1)(*a*) if he seeks to base his petition for divorce under Section 13(1-A)(*ii*) of the Act on such non-cohabitation.[74]

---

73. *Tarachand* v. *Narain Devi*, AIR 1976 P&H 390; see *Sunita R. Nikalje* v. *Rajendra E. Nikalje*, AIR 1996 Bom 85.

74. *Saroj Rani* v. *Sudarshan Kumar Chadha*, (1984) 4 SCC 90.

The expression "the petitioner is not, in any way, taking advantage of his or her own wrong" occurring in Section 23(1)(*a*) does not apply to taking advantage of the statutory right to obtain dissolution of marriage which has been conferred by Section 13(1-A). In order to be a "wrong" within the meaning of Section 23(1)(*a*), the conduct alleged has to be something more than a mere disinclination to agree to the offer of reunion and must be misconduct serious enough to justify the denial of the relief to which the spouse is otherwise entitled.[75]

Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things: forgiveness and restoration. But condonation is always subject to the implied condition that the offending spouse will not commit a fresh matrimonial offence either of the same variety as the one condoned or of any other variety. Condoned cruelty can therefore be revived, say by desertion or adultery. ''Condonation'' under Section 23(1)(*b*) therefore means conditional forgiveness, the implied condition being that no further matrimonial offence shall be committed.[76]

Clause (2) of Section 23 speaks of reconciliation. Conciliation is a process to settle disputes between parties by negotiations. In the following cases, however, no reconciliation is possible, for example, where—

(*a*) the respondent has converted to some non-Hindu religion;

(*b*) he suffers from mental disorder or mental disability;

(*b*) he suffers from virulent and incurable leprosy;

(*d*) he suffers from communicable venereal disease;

(*e*) he has renounced the world and entered into a religious order;

(*f*) he has not been heard of for a period of seven years or more.

If the court fails to attempt reconciliation, will it vitiate the proceedings? According to one opinion it will not make the decree illegal.[77]

Section 23-A provides for relief to the respondent in divorce and other proceedings. According to the section when the relief prayed is—

(*a*) for restitution of conjugal rights (Section 9),

(*b*) for judicial separation (Section 10),

(*c*) for divorce (Section 13)—and

the respondent opposes it alleging that the petitioner himself is guilty of—

(*a*) adultery, (*b*) cruelty, or (*c*) desertion, then on the counterclaim of the respondent against the petitioner the court *may grant* him any relief under the

---

75. *Dharmendra Kumar* v. *Usha Kumar*, (1977) 4 SCC 12, 14, 15.
76. *Narayan Ganesh Dastane* v. *Sucheta Narayan Dastane*, (1975) 2 SCC 326.
77. *Leelawati* v. *Sewak*, AIR 1979 All 285.

Act to which he or she would have been entitled if he or she had presented a petition seeking such relief.

25. DESIRABLE GUIDING PRINCIPLES

While a Court makes a decree of divorce under this Act it should look into the guiding principles evolved by the House of Lords in *White* v. *White*[78] in respect of maintenance and division of property in case of divorce. The judgment would be of much use to Indian Courts.

Property relations between husband and wife broadly fall into two divisions: (1) the *separation of property system* and (2) the *community of property system.* In India we follow the first system which is outdated and is based on popular and erroneous conception that the husband is the breadwinner and therefore the sole master of the assets and the wife has no right to them. There is no recognition of the fact that every marriage is an economic partnership and involves a co-operative effort of the spouses, whether overt or covert, in the accumulation of assets and that irrespective of the fact that these assets may stand in the name of the husband only, they belong to both the partners who have entered into the relation of marriage.

According to the third system, which is a mixture of the above two systems, and which can be named as the *deferred community system*, the spouses are separate with respect to their properties during marriage and the sharing of assets comes into being on dissolution of the marriage.

The Courts in India, while deciding the quantum of maintenance, do usually take into account the status of the parties, but as a matter of practice the petitioner spouse is never granted more than one-third of the income of the respondent spouse. As far as division of property is concerned the Indian law follows the separation system of property and therefore does not provide for division of matrimonial property. As a result, the court would, at the most, grant only a portion of that property towards which both the spouses have contributed in terms of money. The fact that the woman would usually contribute her labour in looking after the welfare of the children and the family, thereby making it possible for the husband to earn enough and contribute money towards the actual purchase of material goods is not a factor which is taken into account by Courts while deciding the quantum of maintenance to be awarded or while dividing the property acquired by the respondent in the course of marital relations because the law as it stands today does not provide them much scope to do so. Similarly at the time of divorce the wife is usually left high and dry without much financial support. And this is one of the major reasons why wives in India bear unwillingly the violent and insolent behaviour of their husbands and do not prefer to walk out of a marriage.

There is, therefore, an active need for a law which provides for the division of matrimonial property, i.e. the property acquired by either spouse after marriage because any such property is the result of the contribution of both the

78. (2001) 1 All ER 1. For details see *Lawyers Collective*, Vol. 17, No. 7, July 2002, pp. 21-27.

spouses, whether in terms of money or in terms of looking after the welfare of the family.

The existing maintenance statutes in India are disparate, chaotic and scattered[79] and are not based on the concept of equal economic partnership of the husband and wife but on the concept of maintenance as gratis or at best an act of compassion.[80] On the contrary it is the wife who sacrifices her future career and serves the husband, their children and sick and infirm parents-in-law. There should be no bias in favour of the money-earner and against the homemaker and the child-carer. Today there is greater awareness of the value of non-financial contributions to the welfare of the family, that is by being at home and having looked after young children a wife may lose forever the opportunity to acquire and develop her own career.

The present approach of law towards maintenance and property divisions in case of divorce requires a meaningful change.

26. ALIMONY (MAINTENANCE) PENDENTE LITE [SECTION 24]

Alimony is the financial provision to a wife from her husband while she was obliged to live apart from him. It might be awarded temporarily *pendente lite*, pending the outcome of the matrimonial cause between the spouses. The amount is at the court's discretion. After a decree of judicial separation alimony became a permanent allowance which continued for the whole period of separation. A wife's allowance is now called maintenance and is a permanent financial provision.[81]

Reading Section 24 it becomes clear that the section empowers the court to grant two specific reliefs to the petitioner. They are:

(*a*) expenses of the proceedings in respect of which the relief is sought, and

(*b*) monthly maintenance allowance during the proceedings.

Section 24 can be invoked in cases of nullity of void marriages, annulment of voidable marriages, restitution of conjugal rights, judicial separation, divorce and alimony. Even in cases of disputed marriages the section can be invoked.

Relief under Section 24 can be availed of by the wife against the husband or by the husband against the wife irrespective of the question as to who started the substantive proceedings against whom. The section put a husband on a par with his wife.

This relief of maintenance is available during the pendency of substantive proceedings under this Act and it comes to an end when the proceedings are over.

---

79. *Matrimonial Property Law in India* by B. Sivaramayya, cited in Swati Mehta's article in LC, 2002 July, p. 27.

80. This is evident from the phrases adopted by the following enactments: Hindu Marriage Act, 1955 Section 25; Section 40 of Parsee Marriage and Divorce Act, 1936; Section 37 (Indian) Divorce Act, 1869 and S. 37 of Special Marriage Act, 1954 and Ss. 125-127, CrPC. and Hindu Adoptions and Maintenance Act, 1956. Moreover maintenance under these laws is conditional upon certain norms of behaviour.

81. D.M. Walker: *Oxford Companion to Law*, pp. 48, 49.

Maintenance is ordinarily granted under Section 24 from the date of application. However, if during the pendency of the proceedings demand for maintenance is made, the court can grant maintenance *pendente lite*[82] from the date of demand. The applicant must prove that he/she has no "independent income sufficient for his or her support". Where expenses of the proceedings are sought the applicant has to prove that he/she has no "independent income sufficient for the necessary expenses" of the proceeding.

An order passed under Section 24 can be varied according to circumstances. The order under this section is non-appealable.

Failure of the court to endeavour to bring about reconciliation of parties before passing an order under Section 24 does not make the order illegal.[83]

Section 24 of the HMA enables a poor spouse to contest without a financial strain the matrimonial dispute against the other rich spouse. Section 125 of the CrPC is a summary remedy to provide maintenance to an indigent wife in order to save her from starvation or vagrancy. Section 15 of the HAMA is recognition of the personal obligation of a husband under the Hindu Personal law to maintain his wife. Therefore, under all these provisions, a wife may get maintenance with due adjustment with respect to the amount of maintenance, because the provider of maintenance is one and the same person — the husband. (Modern Hindu Law p. 367).

Section 24 does not talk of grant of pendente lite maintenance of the children,[84] but as held in *Jasbir Kaur Sehgal* v. *District Judge, Dehradun*,[85] the section cannot be given a restricted meaning, consequently where the wife is maintaining a daughter[86] she can claim maintenance from the husband. A major son is not entitled to maintenance under this section.[87] But a major daughter is entitled.[88] While awarding maintenance expenses for their education should be taken into account. Income of parties must also be taken into account.[89] Every able bodied man must be presumed to be financially productive.[90]

An analogous provision for alimony during the pendency of court proceedings is found under the Special Marriage Act. However, there is a marked difference that under the Hindu Marriage Act either the wife or the husband can claim it, while under the Special Marriage Act it is only the wife that can claim alimony.

The Court has ample discretion in passing such an order, however, it will take into consideration the income of the spouse making the application and the

---

82. *Sushila V. Chhadva* v. *Viresh N. Chhadva*, AIR 1996 Bom 94; *Lataben Y. Goswami* v. *Y.S. Goswami*, AIR 1996 Guj 103.
83. *Dharmendra Kumar* v. *Pushpa Devi*, AIR 1995 MP 210.
84. *Akasam Chinna Babu* v. *Akasam Parbati*, AIR 1967 Ori 163.
85. (1997) 7 SCC 7.
86. Under HMA 1966 it is the father's obligation to maintain daughter.
87. *Lt. Col. Raree Saharwat* v. *Ujjwal Saharwat*, (2002) 1 HLR 336 (P&H).
88. *Kusum* v. *R.K. Saxena*, (2004) 2 HLR 248 (Del).
89. *Rita Dutta* v. *Shubhendu Dutta*, (2005) 6 SCC 619.
90. *Radhika* v. *Vineet Rungta*, (2004) 1 HLR 222 (Cal).

income of the other spouse who is to be ordered to pay the expenses and alimony *pendente lite*. Interim alimony should be a reasonable amount.[91] It is not restricted to one-fifth of the husband's income as is provided under the Divorce Act, 1869.

An order under this section and the amount does not include maintenance for children.[92]

The leading principle, as explained by the Rajasthan High Court, which the court has to bear in mind is that unless good cause is shown for depriving the claimant, she or he, if not possessed of independent means, is entitled to maintenance *pendente lite* and the expenses of litigation.[93] The section does not entitle the court to look into the conduct of either party at all before granting maintenance *pendente lite*.[94]

27. PERMANENT ALIMONY OR PERMANENT MAINTENANCE [SECTION 25]

Section 24 deals with alimony or maintenance *pendente lite* which is temporary while Section 25 deals with permanent alimony. The former may be ordered to be paid before the final disposal of the petition while the latter is ordered after passing of the decree sought. However even this permanent alimony can be varied, modified or even rescinded. [Section 25(2) and (3)]

Either party can apply for this relief.

This section applies to cases under Sections 9 and 10 of this Act.

An order under this section can be made either (*i*) at the time of passing the decree, or (*ii*) at any time subsequent thereto [Section 25(1)]. This means that Section 25 cannot be made use of where no decree is passed at all. In other words if the substantive original petition is dismissed by the court or is withdrawn by the petitioner, no order under this section can be passed.

Husband entitled only under HMA

One has to remember that under the Indian Divorce Act, 1869, The Parsi Marriage and Divorce Act, 1936 and the Special Marriage Act, 1954, only the wife is given this right of alimony. Under the Muslim law also the husband is not entitled to get maintenance from his wife. Thus, it is only under the Hindu legal system that the wife may have to bear the burden of maintaining and supporting her husband after the matrimonial litigation,[95] if his income is not sufficient.[96]

Granting maintenance to a husband is entirely a new concept accepted in the Indian Jurisprudence by Section 25 of HMA.[97] However, in case of divorce, the

---

91. *Rajendran* v. *Gajalakshmi*, AIR 1985 Mad. 195; *Dinesh Mehta* v. *Usha Mehta*, (1978) 80 BLR 298.
92. *Ramesh Chander Kaushal* v. *Veena Kaushal*, (1978) 4 SCC 70: 1978 SCC (Cri) 508.
93. *Mukan Kumar* v. *Ajit Chand*, AIR 1958 Raj 322: ILR 1958 Raj 843.
94. *Keshavram* v. *Nirmalaben*, AIR 1972 Guj 174.
95. *Sachindra Nath Biswas* v. *Banamala Biswas*, AIR 1960 Cal 575: 64 Cal WN 225.
96. *Babasaheb* v. *Leelabai*, (2004) 1 HLR 615 (Bom FB).
97. *Kishan* v. *Sakharbai*, (1987) 2 HLR 689 (Kant).

wife deserved more sympathy. In our society remarriage of divorced wife is more difficult than that of divorced husband.[1]

(a) What amount is payable

As the section lays down the court under Section 25(1) can order to pay—

(*a*) a gross sum; or

(*b*) a monthly sum; or

(*c*) a periodical sum for a term not exceeding the life of the applicant.

(b) Considerations before such an order

The court while making an order for permanent alimony shall have regard to the following:

(*a*) the respondent's own income and other property;

(*b*) the income and other property of the applicant;[2]

(*c*) the conduct of the parties[3]; and

(*d*) the other circumstances of the case [Section 25(1)].[4]

The order made must be "just" and the payment may be secured by a charge on the immovable property of the respondent [Section 25(1)].

(c) When such an order is varied, modified or rescinded

If there is a *change* in the circumstances of either party after the order is made under sub-section (1), the order can be varied, modified or rescinded by the court [Section 25(2)].

The section contemplates three changes as under [Section 25(3)]:

(*a*) when the party in whose favour an order is made, has remarried; or

(*b*) if such party is the wife, she has not remained chaste; or

(*c*) if such party is the husband, he had sexual intercourse with any woman outside wedlock.

In *Narayanswami* v. *Padmanabhan*[5] it was held that a second wife whose marriage with the respondent was a nullity (as he had a wife living at the time of the second marriage) was not entitled to maintenance under Section 25. This,

---

1. *Mihir Narain Mohanty* v. *Sadyalaxmi Patnaik*, (1991) 2 HLR 1 (Ori): Modern Hindu Law, Ch. 4, p. 372.
2. *Sachindra Nath Biswas* v. *Banamala Biswas*, AIR 1960 Cal 575: 64 Cal WN 225; *S. Rashmi Pradip Kumar Jain* v. *Pradip Kumar*, (1994) 2 HLR 309 (Bom); *Manisha Sandeep Gade* v. *Sandeep Vinayak Gade*, (2005) 1 HLR 400 (Bom DB); *Durga Prasanna Tripathy* v. *Arundhati Tripathi*, (2005) 7 SCC 353.
3. *Chhaganlal* v. *Sakkha*, AIR 1975 Raj 8: 1974 Raj LW 291; *Lallubhai Keshavram Joshi* v. *Nirmalaben*, AIR 1972 Guj 174: ILR 1971 Guj 1183: (1972) 13 Guj LR 626.
4. *Babasaheb* v. *Leelabai*, (2004) 1 HLR 615 (Bom FB); *Preeti Swarthakar* v. *Chandrakant, Swarnakar*, (2005) 2 HLR 408.
5. AIR 1966 Mad 394; *see* also *Govindrao Mulsale* v. *Anandibai Mulsale*, 79 BLR 73: AIR 1976 Bom 433.

however, does not seem to be a sound view because Section 25 covers cases of marriages which are void under Section 11, read with Section 5 of the Act.

A decree for alimony or maintenance is not extinguished on the death of the husband and is executable against the deceased husband's estate in the hands of his heirs.[6]

As regards the amount of maintenance, it is a question of fact and it depends upon gathering together all facts of the situation.

28. CUSTODY OF CHILDREN [SECTION 26]

(a) Court's power

This section applies to "any proceedings" under this Act, i.e. it applies to a petition for a decree or an application for an order or any other claim. It gives power to the court to make provisions in regard to:

(*i*) custody,

(*ii*) maintenance, and

(*iii*) education of minor children.

For this purpose the court may make such provisions in the decree as it may deem just and proper. Under this section the court may pass interim orders during the pendency of the proceedings and provisions also could be included in the decree when it is passed; orders could also be made after the date of the decree and orders for revocation, suspension and variation of any of the above said orders and provisions could also be made by the court. The important principle projected by this section is the "welfare of the minor".

(b) Children

The word "children" used in the section would include not only the legitimate children of the marriage, i.e. children of both the parties, but also other children who are born out of void or voidable marriages and are deemed to be legitimate under Section 16 of this Act. Making the above point more explicit the word "children" includes—

(*i*) children of both (out of their marriage);

(*ii*) children of husband only;

(*iii*) children of wife only;

(*iv*) natural as well as adopted children;

(*v*) legitimate as well as illegitimate children.

"Minor children" means children below the age of eighteen years.[7]

A provision or order may be made by the court for the custody, maintenance and education of minor children before passing a final decree, or in

---

6. *Leeladevi Shrivastava* v. *Manoharlal*, AIR 1959 MP 349; *Aruna Basu Mullick* v. *Dorothea Mitra*, (1983) 3 SCC 522: 1983 SCC (Cri) 739.
7. *See* S. 4(A) Hindu Minority and Guardianship Act, 1956; S. 3(*c*) of Hindu Adoptions and Maintenance Act, 1956, S. 3 of Indian Majority Act, 1875.

the decree itself or even after a decree has been passed. Thus passing of a decree in the main proceeding does not put an end to the court's jurisdiction for the purpose of this section, says the Chennai High Court.

(c) Welfare of the minor, a guiding principle

Broadly stated, the guiding principles as to custody, maintenance and education of children, may be laid down as follows:

As laid down by the Rajasthan High Court,[8] courts should look to the substance of the application and should not pay too much importance to the technicalities of the pleadings. The court has complete discretion in this regard and while making such orders it will consider the welfare of the minor.[9] Thus the paramount consideration is the interest or welfare of children. Custody of a child is usually handed over to an innocent party. If the interest of the child so demands, and both the parties are unfit, or the innocent party is abroad, custody of a child may be given even to a third person;[10] and while making such orders it will consider the welfare of the minor.[11] Thus the paramount consideration is the interest or welfare of the children and not the convenience or pleasure of the parents.[12]

(d) Custody

The custody of minor boys and minor unmarried girls is ordinarily with their mother (*see* Section 6 of Hindu Minority and Guardianship Act, 1956), and the court in exercising jurisdiction under Section 26, takes into consideration the above provision. However, the court can deviate from this general principle.

In *Pushpa Singh case*[13] the above proposition was followed and the custody of a child below five years was handed over to the mother, considering the paramount interest of the child.[14]

In *Archana Barthakur case*[15], the question was about the custody of a girl of seven years. The girl was away from her father since five years. She was generally attached to her mother. The mother had a steady income. The court felt that the girl would not find any happiness if placed in the father's custody and her welfare would be fully protected if she remained in the custody of her mother.

---

8. *Snehalata* v. *Mahendra*, AIR 1980 Raj 64.
9. *H. Dasgupta* v. *S. Misra*, AIR 1985 Ori 239.
10. P.N. Chadha : *Hindu Law*, 4th Edn., p. 146.
11. *H. Dasgupta* v. *S. Misra*, AIR 1985 Ori 239; *Sarita Sharma* v. *Sushil Sharma*, (2000) 3 SCC 14: AIR 2000 SC 1019.
12. *Kumar* v. *Jahagirdar* v. *Chetna K. Ramatheertha*, (2001) 4 SCC 682: AIR 2001 SC 2179; *Rohit Dandekar* v. *Raj Kavitha*, (2004) 1 HLR 116 (Kant DB); *Dhanwanti Joshi* v. *Madhav Unde*, (1998) 1 SCC 112 ("Welfare of child" explained).
13. *Pushpa Singh* v. *Inderjit Singh*, 1990 Supp SCC 53: 1990 SCC (Cri) 609; *Rekha Aggarwal* v. *Sunil Aggarwal*, 1992 Supp SCC 438 (1).
14. *Avinash Devi* v. *Khasan Singh Aneja*, AIR 1960 Punj 327.
15. *Archana Barthakur* v. *Ranjit Barthakur*, AIR 1985 Gau 125 NOC.

In *Mamta* v. *Ashok Jagannath Bharuka*[16], the parties separated by a decree of divorce by mutual consent. Before the decree could be obtained the husband applied to the court that he should be appointed as the guardian of his two minor girls. The request was granted. The wife's application for this purpose was rejected by the court, on the reason that she had married some other person. Thereafter the respondent married and the appellant also married. In regard to the custody of children the High Court ordered that wishes of the children must be taken into consideration and opinion of child psychiatrist and child welfare workers should be obtained in this regard. The matter was remanded to the High Court on this court.

(e) Maintenance

Regarding maintenance, a father is always liable for maintenance of children even if they are in the custody of the mother. The court's discretion in the matter is unfettered as to custody or quantum of maintenance.

However the custody of a child could be in terms of a compromise by the parties.[17]

(f) Children's wishes

The section specifically lays down that orders for custody, etc., should be made by the court "consistently with their wishes, whenever possible". Whether the wishes of a child are to be taken into consideration or not, will obviously depend upon the age and the capacity of the child concerned. Reference to wishes of children made in the section seems to be directed mainly to matters of custody.

Orders and provisions made under Section 26 may be revoked, suspended or varied by the court on genuine reasons disclosed by changed circumstances.

In other words as observed in *Padmaja Sharma case*[18] an order under Section 26 is never final and a decree passed thereunder is always subject to modification.

29. DISPOSAL OF PROPERTY [SECTION 27]

The section makes provision with respect to any property represented at or about the time of marriage and belonging jointly to the couple. It may under this section pass a just and proper decree.

The object of the section is to avoid multiplicity of litigation in regard to marriage property. In the absence of such a provision, a matrimonial court would have no jurisdiction like this.

The jurisdiction exercised by the court is in regard to—

(*i*) any property presented

(*a*) "at" the time of marriage, or

(*b*) "about" the time of marriage, and

---

16. (2005) 12 SCC 452.
17. *Leena Roy* v. *Subrato Roy*, 1992 Supp SCC 110.
18. *Padmaja Sharma* v. *Ratanlal Sharma*, (2000) 4 SCC 266: AIR 2000 SC 1398.

(*ii*) such property must belong jointly to both the husband and the wife.

The word "at" refers to the actual time of the marriage and the word "about" means near or round about the time of marriage. Consequently the presents or gifts made subsequent to the marriage are not within the ambit of this section.[19]

In *Pratibha Rani case*[20] it was argued that looking to this section and Section 14 of the Hindu Succession Act, the concept of *Stridhana* is abolished or that a remedy under the criminal law for breach of trust is taken away; but this is not correct. These two sections only provide that if the husband refuses to return the *Stridhana* property of his wife, she can recover this property by instituting a suit. This section, therefore, merely provides an *alternative remedy* to the wife, it does not affect in any way the criminal liability of the husband where he dishonestly misappropriates his wife's *Stridhana*. The abovesaid two Acts do not take away a woman's *Stridhana* right; they merely modify the concept of *Stridhana*.

30. APPEALS, ORDERS AND THEIR ENFORCEMENT [SECTIONS 28 AND 28-A]

Section 28 provides for appeals against decrees [Section 28(1)], appeals against orders [Section 28(2)], appeal as to costs [Section 28(3)] and limitation of appeal [Section 28(4)].

Appeals against the decrees with some exceptions will lie to the High Court depending upon the court wherein the original petitions are presented.

The time limit fixed for an appeal is a period of thirty days from the date of the decree or order [Section 28(4)].

Section 12(2) of the Limitation Act is applicable to an appeal under Section 28 of the Hindu Marriage Act. Therefore, the time required for obtaining copies of the judgment will have to be excluded for computing the period of limitation for an appeal.[21]

Section 28-A provides that the decrees and orders passed under this Act shall be enforced in the like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction are enforced.

[G]

SAVINGS AND REPEALS

31. TEXT: Ss. 29, 30

29. *Savings*.—(1) A marriage solemnized between Hindus before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged

---

19. *Krishnan* v. *Padma*, AIR 1968 Mys 226; *Bal Krishna Rama Chandra Kadam* v. *Sangeeta B. Kadam*, (1997) 7 SCC 500; *Manjit Kaur* v. *Inderjeet Singh*, (1999) 2 HLR 409 (P&H DB); *Suraj Prakash* v. *Mohinder Pal Sharma*, (2005) 1 HLR 268 (P&H DB).
20. *Pratibha Rani* v. *Suraj Kumar*, (1985) 2 SCC 370: 1985 SCC (Cri) 180.
21. *Lata Kamat* v. *Vilas*, (1989) 2 SCC 613.

to the same Gotra or Pravara or belonged to different religions, castes or sub-divisions of the same caste.

(2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.

(3) Nothing contained in this Act shall affect any proceeding under any law for the time being in force for declaring any marriage to be null and void or for annulling or dissolving any marriage or for judicial separation pending at the commencement of this Act, and any such proceeding may be continued and determined as if this Act had not been passed.

(4) Nothing contained in this Act shall be deemed to affect the provisions contained in the Special Marriage Act, 1954 (43 of 1954), with respect to marriages between Hindus solemnized under that Act, whether before or after the commencement of this Act.

30. *Repeals.—Repealed* by the Repealing and Amending Act, 1960 (58 of 1960), Section 2 and First Schedule w.e.f. 16-12-1960.

Section 29 has four savings clauses which may be conveniently named as under:

clause (*a*) : Saving of pre-Act inter-caste marriages;

clause (*b*) : Saving of custom or special law for divorce;

clause (*c*) : Saving of pending proceedings; and

clause (*d*) : Saving of Special Marriage Act, 1954.

Clause (*a*) saves inter-religious, inter-caste and inter-Gotra or intra-Pravar marriages solemnised before the commencement of the Act. Sub-section (1), clause (*b*) saves special laws[22] and customs relating to divorce, [sub-section (2)]. Clause (*c*) saves proceedings which are pending at the commencement of this Act and they may be continued and determined as if this Act had not been passed [sub-section (*c*)]. Lastly, clause (*d*) saves civil marriages under the Special Marriage Act, 1954.

Section 30 repeals the following Acts:

(1) the Hindu Marriage Disabilities Removal Act, 1946;

(2) the Hindu Marriage Validity Act, 1949;

(3) the Mumbai Prevention of Hindu Bigamous Marriages Act, 1946;

(4) the Mumbai Hindu Divorce Act, 1947;

(5) the Chennai Hindu (Bigamy Prevention and Divorce) Act, 1949;

(6) the Saurashtra Prevention of Hindu Bigamous Marriages Act, 1950; and

(7) the Saurashtra Hindu Divorce Act, 1952.

Since the provisions of the above Acts were incorporated into the Hindu Marriage Act, these Acts have been repealed. However marriages void under

---

22. The following enactments providing for divorce have been regarded as "Special enactments" under S. 29(2): (1) Chennai Aliyasanthana Act, 1949; (2) Travancore Nayar Act, 1100 (M.E.); and (3) Travancore Ezhava Act, 1100 (M.E.).

those Acts are not valid under the present Act. But there were some other enactments which remained unrepealed. Consequently Section 30 was repealed with effect from 16-12-1960.

32. LEGITIMACY OF CHILDREN: SECTION 16

A marriage affects legitimacy of children born of it. Legitimacy is the quality of being a legitimate child.[23] Dissolution of the marriage of their parents does not affect the legitimacy. This is so because such children were born when a valid marriage was subsisting. Children born without a marriage or born out of an invalid marriage are called.

The policy of law is that people should indulge in sex through a valid marriage only. Rights of illegitimate children are less than those of lawful children. But this policy of law which was termed as inhuman and unjust is now improved and rectified by Section 16 of the HMA. It now puts amend to a great social evil.[24] This amendment was made in accordance with the recommendations of the Law Commission of India.[25] Now the provisions regarding void and voidable marriages are improved to a large extent.[26]

A child born out of a null and void marriage (S. 11) is now a legitimate child. No protection is extended to the mother of the child. She is not entitled to gratuity or provident fund or pension from the man.[27] But in these days of women's upliftment and employment the case may be vice versa too the section does not deal with the children born out of a concubine. They are illegitimate,[28] and are not entitled to succession certificate. Such children are also not recognised as members of the family of the putative father.[29]

In short (*i*) though a decree of nullity is granted or not under the HMA in regard to that marriage or (*ii*) the marriage is judicially declared void in any proceeding other than a petition under this Act, the children of void marriage are legitimate.[30]

It must be noted that the amendment of 1976 has plugged this lacuna which existed in HMA before its amendment. The amendment is retrospective as well as prospective. Consequently, this position prevails from the beginning of the HMA.[31]

Section 16 makes no distinction between the effect of void and voidable marriages on the legitimacy of children born after the passing of the decree of

---

23. S. 112, Evidence Act, 1872.
24. *Jinia Kiotin* v. *Kumar Sitaram Manjhi*, (2003) 1 SCC 730.
25. In its 59th Report pp. 35-36.
26. See ante, para 18.
27. *Yamunabai Anantrao Adhav* v. *Anantrao Shivram Adhav*, (1988) 1 SCC 530 (principle of estoppel not applicable); *Kesari Bai* v. *Parvati*, (2000) 1 HLR 707 (MP).
28. *Sujaram* v. *Subramaniam*, (2000) 1 HLR 600 (Mad).
29. *Kesari Bai* v. *Parvati*, (2000) 1 HLR 707 (MP).
30. *Maharani Kusum Kumari* v. *Kusum Kumari Jadeja*, (1991) 1 SCC 582: 1991 ALR 291.
31. Section 11 of the Act is prospective only (unlike S. 12) Children of the void marriage therefore, before the commencement of this Act on 18-5-1955 are not made legitimate by this section. See *Kanwal Jit* v. *N.K. Singh*, AIR 1961 Punj 331.

nullity or their right to succeed to the property of the parties to such marriages as their legitimate children.[32]

Section 16 can be invoked only when the marriage is solemnised. If the marriage is not solemnised in compliance with Section 7, it is neither void nor voidable. The relationship is simply illicit. The children of such relationship are not made legitimate by this section.[33]

33. OFFENCES RELATING TO MARRIAGE[34]

Section 17 punishes bigamy and to this offence the provisions of Sections 494 and 495 would apply.

Section 18 punishes marriages solemnized in contravention of certain conditions for a Hindu marriage.

For contravention of conditions specified in clause (*iii*) of Section 5, punishment of simple imprisonment up to fifteen days or a fine up to Rs 1000 or both are provided. Similarly for contravention of the conditions specified in clauses (*iv*) and (*v*) punishment of simple imprisonment up to one month or a fine up to Rs 1000 or both are provided.

The Indian Penal Code, Sections 493-498, enumerates these offences which fall into the following four groups:

(*i*) Mock marriages: Sections 493, 496.

(*ii*) Bigamy; Sections 494, 495, 496.

(*iii*) Adultery; Section 497, and

(*iv*) Criminal Elopement; Section 498.

The first group includes two distinct offences:

(*a*) cohabitation caused by a man deceitfully inducing a belief of a lawful marriage; Section 493; and

(*b*) dishonestly and fraudulently going through a marriage ceremony knowing that no lawful marriage is thereby created [Section 496].

The HMA enforces the rule of monogamy with the help of the Criminal law by penalising bigamy, polygamy and polyandry.[35]

(1) Deceitfully obtaining the body of a woman [Section 493]

Section 493 punishes a person for obtaining the body of a woman by deceitfully assuring her that he had acquired that right by a lawful marriage or *jus mariti*.[36]

---

32. *Sheelwati* v. *Ram Nandani*, AIR 1981 All 42: 1981 MLR 182.
33. *M. Muthayya* v. *Kamu*, AIR 1981 NOC 172 (Mad): (1981) 1 Mad LJ 107: 1981 HLR 362; *Ramkali* v. *Mahila Shyamwati*, (2000) 2 HLR 676 (MP); *Reshamlal Baswan* v. *B.S. Jwalasingh Punjabi*, (1994) 2 HLR 188 (MP).
34. B.M. Gandhi: *Indian Penal Code*, Chap. 20, pp. 540-551.
35. *Dalganti Raghava Reddy, In re*, AIR 1968 AP 117: (1967) Andh LT 359.
36. *Abdul Khader, In re*, 1970 Cri LJ 1321 (Mad).

As there are many religions and modes of celebrating marriages, effecting a divorce, etc., permissible under the personal laws in India, the effective enforcement of this section has become difficult. Moreover the bias of law against women aggravates the situation. The law of adultery is a flagrant violation of woman's dignity.[37] *Batuk H. Mehta case*[38] is a leading case under Section 493.

(2) Inducing a wrong belief of a valid marriage [Section 496]

Section 496 applies to mock marriages wherein a ceremony of marriage is gone through which does not constitute a marriage. One of the parties to such marriage in such cases is deceived[39] by the other by leading him/her into a belief that a valid marriage is constituted. In absence of deceit or fraud the section is not attracted.

(3) Bigamy [Section 494]

Section 494 relates to bigamy [*see* supra, under para 19, sub-para (3) page 259]. The section prohibits and punishes a second marriage when the other spouse is living but the very purpose and object of the section is defeated by exception number one to the section which reads that the section would not apply to any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction. This defence puts into the hands of unprincipled and spineless persons an instrument with the help of which they can defeat the section and go scot-free.

A suggestion may therefore be made that if the first marriage is consummated the defence of exception number one to this section must not be allowed; it must be statutorily barred. Along with Section 17 of the Hindu Marriage Act, Section 50 of the Evidence Act and Sections 494, 495, 497 and 498 should be suitably amended, so that anyone who remarries during the life of his or her spouse comes within the clutches of the amended provision.

Concubinage during a subsisting marriage is not bigamy as there is no matrimonial alliance between the parties. It is not punishable under the Act, but it is a ground for divorce.[40]

Muslim law does not punish violation of monogamy. In *Suresh* v. *Union of India* it was observed that the Holy Quran permits more than one wife and it is protection under Articles 25 and 26 of the Constitution. But this approach of the court seems faulty because the freedom of religion granted under the Articles is subject to the provisions of part III of the Constitution. [Article 25(1)]

(4) Adultery [Section 497]

Section 497 mentions adultery[41] as an offence committed by a third person

---

37. B.M. Gandhi: *Indian Penal Code*, S. 497 on p. 549.
38. *State of Gujarat* v. *Batuk Hiralal Mehta*, (1974) 15 GLR 391.
39. *Ibid.*
40. (1991) 1 HLR 632 (All DB).
41. *See* supra note 20(*d*), p. 248 in this chapter.

against a husband in respect of his wife. Consequently a married man having sexual intercourse with an unmarried woman, or with a widow or a married woman whose husband consents to it or with a divorced woman, commits no offence under this section.

Consent of the woman under the section is of no relevance.

The law continues to treat a woman as a non-person and an object, giving her the status of property. A law which thus forces a woman to live under a code imposed by men, totally negating the feminine viewpoint, is alien to truly humanistic values. The law therefore requires to be amended.

(5) Criminal elopement [Section 498]

Section 498—The gist of this offence consists in the deprivation of the husband of his control and custody of his wife with the object of having illicit intercourse with her. However, it must be noted that consent or willing disposition of the wife in this regard is of no relevance.

A wife under this section cannot be punished as an abetter.

(6) Feigning conversions to escape punishment for bigamous marriages

In *Sarla Mudgal case*[42], the husband converted himself into a Muslim by adopting Islam. He then married another wife. Here the question was whether by conversion the first marriage is annulled or it becomes void and whether the husband commits an offence by bigamy. The court said that the first marriage subsists and the husband commits an offence of bigamy. Against this an appeal was filed by the husband and this appeal was disposed by along with the case of *Lily Thomas*[43], by the Supreme Court.

In *Lily Thomas case* (supra), the same questions arose before the Court for consideration. The Supreme Court observed that the *institution of marriage* under every personal law is a sacred institution. Under Hindu law *marriage is a sacrament*. Both these have to be preserved therefore. Religion is not a commodity to be exploited, it is a matter of faith. When a non-Muslim married according to religious rites stipulating monogamy, renounces his religion, converts to Islam and solemnises a second marriage, according to Islamic rites, without divorcing his first wife, the second marriage is void. Here a person feigns to have adopted another religion, just for some worldly gain or benefit, and this is religious bigotry. The conversion does not automatically dissolve the first marriage. Since a bigamous marriage is an offence under Section 17 of the HM Act, any marriage solemnized by the husband during the subsistence of the first Hindu marriage is void under Section 11 and an offence under Section 17 read with Section 494 of the Indian Penal Code. The Supreme Court affirmed the decision in *Sarla Mudgal case* (supra) and dismissed the husband's appeal.

---

42. *Sarla Mudgal* v. *Union of India*, (1995) 3 SCC 635.
43. *Lily Thomas* v. *Union of India*, (2000) 6 SCC 224: (2000) SCC (Cri) 1056: AIR 2000 SC 1650: 2000 Cri LJ 2433.

(7) Rajasthan Dharma Swatantrya Bill, 2006

The Rajasthan Assembly passed an anti-conversion Bill with voice-vote on the concluding day of the Budget Session. The Rajasthan Dharma Swatantrya Bill, 2006 (Religious Freedom Bill) has a provision for re-conversion to Hinduism. The Home Minister, who tabled the Bill, said the Bill was necessary to check the activities of Christian missionaries in some parts of the State, especially in Kota. The Bill is not against any specific religion.[44]

---

44. *Lawyers Collective*, April 2006 (Vol. 21, No. 4), p. 7.

Chapter XVII
Succession

SYNOPSIS

[A]

1. Introductory
2. Hindu Succession Act, 1956: Notable features and the changes effected
3. Brief history, object and scope of the Act
4. Title, extent and commencement [Section 1]
5. Text: Sections 2, 3 & 4
   - (*a*) Application [Section 2]
   - (*b*) Definitions [Section 3]
   - (*c*) Overriding effect of the Act [Section 4]

[B]

INTESTATE SUCCESSION

6. Text: Sections 5, 6, 7 & 17
7. Act not to apply to certain properties [Section 5]
8. Devolution of interest in coparcenary property [Section 6]
   - (*a*) Scope and applicability
   - (*b*) Para one
   - (*c*) Para two
   - (*d*) Explanations
   - (*e*) Illustrations
9. Devolution of interest in the property of a Tarwad, Tawazhi, Kutumb, Kavaru or Illom [Section 7]
   - (*a*) General
   - (*b*) The Marumakkattayam and the Aliyasantana law
     - Mitakshara and Marumakkattayam:
       - Points of Similarities
       - Points of Contrasts
   - (*c*) Sthanam property
   - (*d*) Special provisions in regard to persons governed by Marumakkattayam and Aliyasantana laws [Section 17]

[C]

GENERAL RULES OF SUCCESSION IN THE CASE OF MALES [Sections 8-13 & 19]

10. Text: Sections 8-13 & 19
11. General
12. When does Section 8 apply?
13. Classification of heirs
    - (*a*) Class I heirs
    - (*b*) Class II heirs
    - (*c*) Notable points
    - (*d*) Class III and Class IV heirs
14. Order of succession among heirs in the Schedule [Section 9]
15. Distribution of property among heirs in Class I [Section 10]
    - (*a*) Rules
    - (*b*) Illustrations
16. Distribution of property among heirs in Class II [Section 11]
17. Distribution of property among agnates and cognates [Sections 12 and 13]
18. Computation of degrees [Section 13]
    - (*a*) Rules
    - (*b*) Table

[D]

PROPERTY OF A FEMALE HINDU AND RULES OF SUCCESSION IN HER CASE [Sections 14, 15 & 16]

19. Text: Sections 14, 15 & 16
20. Absolute property of a female Hindu [Section 14]
    - (*a*) Scope and application
    - (*b*) Section 14(1)
    - (*c*) "Property", "Acquisition" and "Possession": Meaning of
    - (*d*) Section 14(2)
21. General rules of succession in the case of a female Hindu [Sections 15 & 16]
    - (*a*) Scope and application [Section 15]
    - (*b*) Groups of heirs [Section 15(1)]
    - (*c*) Kinds of property of the deceased intestate female [Section 15(2)]
    - (*d*) Son, stepson, sons and daughters
    - (*e*) Stepsons and stepdaughters
    - (*f*) Exceptions to Section 15(1)

22. Order of succession and manner of distribution among heirs of a female Hindu [Section 16]
(*a*) Three rules
(*b*) Scope and application
(*c*) Illustrations

[E]

AMENDMENTS

[F]

GENERAL PROVISIONS RELATING TO SUCCESSION [Sections 18-24]

23. Text: Sections 18 to 23
24. General
(*a*) Full-blood preferred to half-blood [Section 18]
(*b*) Mode of succession of two or more heirs [Section 19]
(*c*) Right of children in womb [Section 20]
(*i*) General
(*ii*) Scope and application
(*iii*) Illustration
(*d*) Presumption in cases of simultaneous deaths [Section 21]
(*i*) Scope and application
(*ii*) Illustrations
(*e*) Preferential right to acquire property [Section 22]
(*i*) Analysis and scope
(*ii*) Nature of right granted by the section
(*f*) Special provision respecting dwelling-houses [Section 23]
Scope & application

[G]

DISQUALIFICATION AND ESCHEAT

25. Text: Sections 24-28 & 29
26. General
(*a*) Widows remarrying [Section 24]
(*b*) Murderer disqualified [Section 25]
(*i*) Who are disqualified
(*ii*) Murder for whose property
(*iii*) The common law doctrine
(*iv*) Illustrations
(*c*) Convert's descendants disqualified [Section 26]
(*i*) Scope and application
(*ii*) Rights of the convert and his descendants
27. Status of the disqualified person [Section 27]
28. Disease, defect, etc., not to disqualify [Section 28]
(*a*) Meaning of disease, defect and deformity
(*b*) Unchastity no disqualification

[H]

ESCHEAT

29. Failure of heirs [Section 29]
(*a*) The section
(*b*) Escheat: Meaning of
(*c*) Scope and application

[I]

TESTAMENTARY SUCCESSION

30. Text: Section 30

[J]

REPEALS

31. Repeal

THE SCHEDULE

[A]

1. INTRODUCTORY

Before the Hindu Succession Act, 1956 came into force in this country different systems of succession to the property of a Hindu were in vogue in different parts of the country namely the Mitakshara, the Dayabhaga, the Mayukha, the Marumakkattayam, the Aliyasantana and the Nambudri. Punjab had its own customary laws. As observed by the Privy Council[1] property which

1. *Katamma Natchiar* v. *Rajah of Shivagunga*, (1863) 9 MIA 543.

was joint and property which was separate, both followed different modes of succession. Interest in the former passed by survivorship to others while interest in the latter passed by inheritance. The Rules of these systems were scattered here and there and there were pieces of legislation relating to the subject.[2]

Similarly succession to *Stridhana* — i.e., woman's absolute property — was quite on a different line from succession to the property of males. With respect to property (except *Stridhana*) possessed by a woman and known as her limited estate (which included property inherited by her either from a male or from a female and property obtained by her on partition), the same passed to the next heir of the last full owner, as a woman was not considered to be a fresh stock of descent.

(**Note**: For uncodified law as to inheritance and partition the reader may refer to Chapters XIII and XIV *ante*.)

Systems of succession were built round a male (patriarchal system) and society was predominated by males. However in Kerala, a woman was considered to be a fresh stock of descent and consequently the system of succession that prevailed there was matriarchal.

It would be interesting to note that in Punjab succession to property was governed to a large extent by customary rules.

Thus separate rules applied to joint family property and to one's separate or absolute property. Not only this but there were separate rules for succession to property of persons governed by *Mitakshara* and by *Dayabhaga* schools. These rules varied with different areas. The British applied and interpreted these rules in their own way and according to their own understanding which gave rise to various inequitable rules. As if this was not enough, the confusion came to be more confounded by various contradictory decisions of courts. This position continued up to 16th June, 1956. As a first step in correcting this situation in 1937, the Hindu Women's Right to Property Act tried to give some more rights of succession to a woman. This was followed by the Hindu Succession Act, 1956 which became effective from 17-6-1956, and which not only gave new rules of succession but made revolutionary changes in succession by laying down a uniform and comprehensive system of succession which apply to both the systems, i.e. Mitakshara and Dayabhaga.

2. HINDU SUCCESSION ACT, 1956: NOTABLE FEATURES AND THE CHANGES EFFECTED

The Hindu Succession Act, 1956 came into force on 17th June, 1956. The Act is a clear break with the past effecting momentous and far-reaching changes in the law of intestate succession among Hindus. The changes brought about may be enlisted as follows:

---

2. The Caste Disabilities Removal Act, 1850, the Hindu Widow's Remarriage Act, 1856, the Hindu Inheritance (Removal of Disabilities) Act, 1928, the Hindu Law of Inheritance (Amendment) Act, 1929 and the Hindu Women's Right to Property Act, 1937.

(*i*) *Uniformity of application:* The Act applies to all Hindus, i.e. it is applicable not only to persons governed by both the Mitakshara and Dayabhaga schools, but also to persons in certain parts of South India who were before governed by the Marumakkattayam, Aliyasantana and Nambudri systems of Hindu law. It thus lays down a uniform and comprehensive system of inheritance applicable to Hindus throughout India and brings them under one cover.

(*ii*) *Classification of heirs abolished*: Under the ancient schools the following classes of heirs were recognised, i.e.

(*a*) Gotraja Sapinda, (*b*) Samanodakas, and (*c*) Bandhus — under the Mitakshara school, and

(*b*) Sapindas, (*b*) Sakulyas, and (*c*) Bandhus — under the Dayabhaga school;

the present Act does away with this classification and divides heirs into four divisions or categories, i.e.:

(*a*) heirs of Class I,
(*b*) heirs of Class II,
(*c*) agnates, and
(*d*) cognates.

The law of succession is thus completely unlinked from its former nexus with religion.

(*iii*) *Devolution of interest in coparcenary property*: Rules of Mitakshara coparcenary property are changed as is evident from the proviso to Section 6 which lays down that if a member of a Mitakshara coparcenary dies leaving a widow, then his interest devolves not by survivorship but by testamentary or intestate succession. The widow therefore gets a right equal to that of a male.

(*iv*) *Inheritance in regard to separate property:* Under the ancient Hindu law two systems of inheritance to separate (or self-acquired) property of a male dying intestate were in vogue; one under the Mitakshara system and the other under the Dayabhaga system; the Act puts an end to it and introduces a uniform system as laid down by Section 8.

(*v*) *Abolition of Hindu woman's limited estate*: The Act abolishes a Hindu woman's limited estate. Henceforth any property held by a female Hindu, howsoever and whensoever acquired by her, is to be her absolute property over which she has complete and unrestricted power to deal with it. She can dispose it of by Will also. (*See* Section 14 of the Act.)

(*vi*) *Impartible estates abolished*: The Act abolishes all impartible estates, except those mentioned in Section 5(*ii*) and (*iii*).

(*vii*) *Succession to Stridhana property*: Under the ancient law its succession varied accordingly as a woman was married or unmarried. If she was married, the form of marriage was an important point. Similarly the source of Stridhana had importance too. Rules as to the quantum of property to be inherited also varied. The Act now abolishes all these peculiarities and under Section 15 it lays down a uniform scheme of succession to property of a Hindu female dying intestate after the commencement of this Act.

(*viii*) *Removal of disqualification of heirs*: Under the ancient Hindu law as interpreted by courts, certain defects, deformities and diseases were grounds for excluding a person from succession. Section 28 of the present Act removes such disqualifications for inheriting property.

(*ix*) *Disposal of coparcenary interest by Will*: Prior to the present legislation according to Mitakshara law, a coparcener had no right to dispose of by Will his undivided coparcenary interest, even if the other coparcener consented to it. This restriction is now totally abolished by the Explanation to Section 30.

(*x*) *Preferential right to acquire property in certain cases*: Where property of an intestate devolves upon two or more persons (heirs) and if any one of them proposes to transfer his or her interest in that property, the other heir has a preferential right to acquire such interest. This is provided by Section 22. This right is like a right of pre-emption.

(*xi*) *Simplification of rules of succession*: There has been a simplification of the rules of succession. Consequently the conflicting decisions of High Courts are now done away with.

(*xii*) *Scheme of simultaneous heirs*: The Act introduces a scheme of simultaneous heirs like the Muslim law and lets in quite a large number of female heirs in addition to the recognised ones.

(*xiii*) *Chance to blood-relations*: Section 8 read with Section 3(*a*) and (*c*) provides in such a manner that all blood-relations have a chance to succeed to the deceased's property before it is escheated in favour of the Government.

(*xiv*) *Complete equality between male and female heirs*: The Act lays down complete equality between male and female heirs.

(*xv*) *Remarriage of a widow after inheritance*: As evidenced by Section 24, remarriage by a widow after inheriting from her former husband would not divest her of the inherited property.

(*xvi*) *Joint tenancy in succession removed*: By the provisions of Section 19 the joint tenancy in succession by co-heirs is abolished.

(*xvii*) *Presumption introduced*: The Act introduces a rule of artificial presumption in case of simultaneous deaths, that the younger survived the elder. [Section 21]

3. BRIEF HISTORY, OBJECT AND SCOPE OF THE ACT

The Hindu Law of Succession in its ancient and traditional form remained in application in India without any substantial reform till the middle of the Nineteenth Century. In other words the ancient law remained almost intact except for a few customs here and there which made certain inroads. Old ideas had given place to new and there was a pressing demand for change due to exigencies of changing needs of society. The Hindu Succession Act, 1956 is the climax of this pressing demand for change for a more consistent, coherent and equitable system. The drive for change which arose and started in the early nineteenth century was encouraged by society and its leaders. Due to this an expert committee of leaders, lawyers and jurists was constituted in 1941. The committee presented 2 drafts, one for intestate succession and the other for a law of marriage. In 1944 the committee was revived and it was given a specific direction to prepare an exhaustive piece of legislation covering all branches of Hindu law. Accordingly a Hindu Code Bill was formulated. It was put to debate in the Central Legislative Assembly on April 11, 1947 and debates went on till September 1951. From the debates it was found that public opinion was against the reform. The Code Bill was therefore broken up into four parts and gradually got passed. The first part was the Marriage Bill and the second was regarding intestate succession which is now before us as the Hindu Succession Act, 1956 (Act 30 of 1956).

The object of the Act is fourfold, i.e. (*i*) to supply a fairly uniform law for all Hindus in regard to property with respect to which deceased person has not made a Will; (*ii*) to give right of inheritance to daughters; (*iii*) to evolve a table (list) of heirs (based on natural love and affection rather than on religious efficacy) which are entitled to succeed on intestacy; and (*iv*) to see that this law is administered well without any interference from custom; or that the Act becomes exclusive and exhaustive with reference to the matters provided in it.

For matters for which no provision is made, the old law will continue to apply. Scope of the word "Hindu"[3] is widened so as to include therein all persons or every citizen of India who is not a Muslim, Christian, Parsi or Jew by religion (*see* Section 2). The Act also applies to Hindus domiciled outside India. Besides this the status of a Hindu is conferred on persons, even though such status may be doubtful when the personal law of the parties is invoked[4] (*see* Section 2).

---

3. *Sridharan* v. *CWT*, AIR 1970 Mad 249.
4. See *Perumal Nadar* v. *Ponnuswami*, (1970) 1 SCC 605: AIR 1971 SC 2352; *Shastri Yagnapurushdasji* v. *Muldas Bhundardas Vaishya*, AIR 1966 SC 1119.

4. TITLE, EXTENT AND COMMENCEMENT [Section 1]

1. *Short title and extent.*— (1) This Act may be called the Hindu Succession Act, 1956.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

The official title of the Act is "the Hindu Succession Act, 1956".

It applies to all places in India except the State of Jammu and Kashmir which has its local Hindu Succession Act. The Act is extended in its application to Pondicherry, Dadra, Nagar Haveli (in 1963), but it does not apply to Goa, Daman and Diu.

Application.—The Act has no retrospective application.

5. TEXT: SECTIONS 2, 3 & 4

2. *Application of Act.*—(1) This Act applies:

(*a*) to any person, who is a Hindu by religion in any of its forms or developments including a Virashaiva, Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj;

(*b*) to any person who is a Buddhist, Jaina or Sikh by religion; and

(*c*) to any other person who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:

(*a*) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(*b*) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;

(*c*) any person who is a convert or reconvert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

3. *Definitions and interpretation.*—(1) In this Act, unless the context otherwise requires:—

(*a*) "agnate"—one person is said to be an "agnate" of another if the two are related by blood or adoption wholly through males;

(*b*) "Aliyasantana law" means the system of law applicable to persons who, if this Act had not been passed, would have been governed by the Chennai Aliyasantana Act, 1949 (Chennai Act 9 of 1949), or by the customary *Aliyasantana* law with respect to the matters for which provision is made in this Act;

(*c*) "cognate"—one person is said to be a "cognate" of another if the two are related by blood or adoption but not wholly through males;

(*d*) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family;

(*e*) "full-blood", "half-blood" and "uterine blood":

(*i*) two persons are said to be related to each other by full-blood when they are descended from a common ancestor by the same wife, and by half-blood when they are descended from a common ancestor but by different wives;

(*ii*) two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands;

Explanation.— In this clause "ancestor" includes the father and "ancestress" the mother;

(*f*) "heir" means any person, male or female, who is entitled to succeed to the property of an intestate under this Act;

(*g*) "intestate"— a person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect;

(*h*) "Marumakkattayam law" means the system of law applicable to persons:

(*a*) who, if this Act had not been passed, would have been governed by the Chennai Marumakkattayam Act, 1932 (Chennai Act 22 of 1933); the Travancore Nayar Act (2 of 1100); the Travancore Ezhava Act (3 of 1100); the Travancore Nanjinad Vellala Act (6 of 1101); the Travancore Kshatriya Act (7 of 1108); the Travancore Krishnanvaka Marumakkathayee Act (7 of 1115); the Cochin Marumakkattayam Act (33 of 1113); or the Cochin Nayar Act (29 of 1113) with respect to the matters for which provision is made in this Act; or

(*b*) who belong to any community, the members of which are largely domiciled in the State of Travancore-Cochin or Chennai [as it existed immediately before the 1st November, 1956], and who, if this Act had not been passed, would have been governed with respect to the matters for which provision is made in this Act by any system of inheritance in which descent is traced through the female line;

but does not include the *Aliyasantana* law;

(*i*) 'Nambudri law' means the system of law applicable to persons who, if this Act had not been passed, would have been governed by the Chennai Nambudri Act, 1932 (Chennai Act 21 of 1933); the Cochin Nambudri Act (17 of 1113); or the Travancore Malayala Brahmin Act (3 of 1106) with respect to the matters for which provision is made in this Act;

(*j*) 'related' means related by legitimate kinship:

Provided that illegitimate children shall be deemed to be related to their mother and to one another, and their legitimate descendants shall be deemed to be related to them and to one another; and any word expressing relationship or denoting a relative shall be construed accordingly.

(2) In this Act, unless the context otherwise requires, words importing the masculine gender shall not be taken to include females.

4. *Overriding effect of Act.*— (1) Save as otherwise expressly provided in this Act,—

(*a*) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act, shall cease to have effect with respect to any matter for which provision is made in this Act;

(*b*) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

(2) [*Omitted* by Act 39 of 2005, Section 2, w.e.f. 9-9-2005].

(a) Application [Section 2]

Section 2 embodies in itself the principal application clause of the Act in the sense that it lays down not only the geographical extent of the Act but also the details as to the groups of persons governed by the Act.

For a detailed discussion of this statement one may refer to Chapter XVI on "Marriage", para 6.[5]

(b) Definitions [Section 3]

Section 3 defines—

(*a*) agnate, (*b*) *Aliyasantana* law, (*c*) cognate, (*d*) custom and usage, (*e*) full-blood, half-blood and uterine blood, (*f*) heir, (*g*) intestate, (*h*) Marumakkattayam law, (*i*) Nambudri law, and (*j*) related.

For "custom and usage", "full-blood, half-blood and uterine blood" *see* Chapter XVI, "Marriage", para 7.

Agnate.—Two persons related to each other "wholly through males" are agnates of each other.

Cognate.—Two persons related to each other "not wholly through males" are cognates of each other.

In either case the relationship may be by blood or by adoption. Such relationship may exist between males and females, i.e. there may be both male and female agnates and both male and female cognates.

Intestate.—A person is deemed to die intestate in respect of his property of which he has not made a testamentary disposition (i.e. a will) which is capable of taking effect.

Related.—Related means related by legitimate kinship. The definition further provides that illegitimate children shall be deemed to be related to their mother and to one another. Their legitimate descendants are also deemed to be related to them and also to one another.

---

5. *See* also Dr T. Mahmood's: *Hindu Law*, (1981), p. 327 and Table I wherein the Section [2(*a*) and 2(*b*)] is analysed. See *Lakshmi N. Tudu* v. *Basi Majhian*, AIR 2004 Jhar 121 (Santhal Scheduled Tribes are Hindus).

This definition is purposive in that it gives recognition to the status of illegitimate children and their mother, in matters of succession. In other words the expression related is so defined as to ensure that the rights of illegitimate children are safeguarded as against their mother, as also against their own legitimate descendants. For example, to confine this relationship to legitimate kinship results in withholding the property of a "*Naikin*" from passing it to her sons or daughters. And this is in no way just.

Aliyasantana law, Marumakkattayam law and Nambudri law: These expressions denote Malabar laws.

(c) Overriding effect of the Act [Section 4]

To override is to supersede, to disregard, to prevail over or to set aside. The general effect of the Act is to set aside or to prevail over and consequently to do away with the personal law of the Hindus as derived from the Shastras, Commentaries and their interpretations, and also the customs and usages which are incorporated into such law as governing the persons who are subject to that law. The rules of succession which were previously applicable to Hindus and which were contained in previous statutes, if any, are also done away with. Thus all kinds of textual and customary Hindu law and its rules are set aside. Besides this all legislative enactments before 1956 will cease to apply to Hindus to the extent they are inconsistent with any of the provisions contained in this Act.[6]

However, the doctrine of pious obligation to pay one's father's debts[7] is not abolished. Similarly, as held by the Punjab High Court, the rules of Punjab customary law relating to alienation of ancestral property in the hands of a male holder remain intact.

Section 4(2) saves the laws providing for (*a*) prevention of fragmentation of agricultural holdings, (*b*) fixation of ceilings, and (*c*) devolution of tenancy rights in agricultural holdings.

[B]

INTESTATE SUCCESSION

6. TEXT: SECTIONS 5, 6, 7 & 17

5. *Act not to apply to certain properties*.—This Act shall not apply to —

(*i*) any property succession to which is regulated by the Indian Succession Act, 1925 (39 of 1925), by reason of the provisions contained in Section 21 of the Special Marriage Act, 1954 (43 of 1954);

(*ii*) any estate which descends to a single heir by the terms of any covenant or agreement entered into by the Ruler of any Indian State with the Government of India or by the terms of any enactments passed before the commencement of this Act;

---

6. Hindu Widows' Remarriage Act, 1856; Hindu Disposition of Property Act, 1916; Hindu Law of Inheritance (Removal of Disabilities) Act, 1928; Hindu Law of Inheritance (Amendment) Act, 1929; Hindu Gains of Learning Act, 1930; Hindu Women's Right to Property Act, 1937 and local laws relating to succession among Hindus, if any.

7. *Nathubhai* v. *Chhotubhai*, AIR 1962 Guj 68.

(*iii*) The Valiamma Thampuran Kovilagam Estate and the Palace Fund administered by the Palace Administration Board by reason of the powers conferred by Proclamation (9 of 1124), dated 29th June, 1949, promulgated by the Maharaja of Cochin.

6. *Devolution of interest in coparcenary property.*—(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—

(*a*) by birth become a coparcener in her own right in the same manner as the son;

(*b*) have the same rights in the coparcenary property as she would have had if she had been a son;

(*c*) be subject to the same disabilities in respect of the said coparcenary property as that of a son,

and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition of testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act, or any other law for the time being in force, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu Family governed by the Mitakshara law, shall devolve by testamentary or intestate succession as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,—

(*a*) the daughter is allotted the same share as is allotted to a son;

(*b*) the share of the predeceased son or a predeceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such predeceased son or such predeceased daughter; and

(*c*) the share of the predeceased child of a predeceased son or of a predeceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such predeceased child of the predeceased son or a predeceased daughter, as the case may be.

Explanation.—For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great grandson for the recovery of any debt due from his father, grand father or great grand father solely on the ground of the pious obligation under the Hindu law, of such son, grand-son or great grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect—

(*a*) The right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(*b*) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation.—For the purposes of clause (*a*) the expression "son", "grandson" or "great grandson" shall be deemed to refer to the son, grandson or great grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation.—For the purposes of this section, "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.

7. *Devolution of interest in the property of a tarwad, tavazhi, kutumba, kavaru or illom.*— (1) When a Hindu to whom the *Marumakkattayam or Nambudri* law would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an interest in the property of a *tarwad, tavazhi or illom*, as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to the Marumakkattayam or Nambudri law.

Explanation.— For the purposes of this sub-section, the interest of a Hindu in the property of a *tarwad, tavazhi* or *illom* shall be deemed to be the share in the property of the *tarwad*, *tavazhi* or *illom*, as the case may be, that would have fallen to him or her if a partition of that property *per capita* had been made immediately before his or her death among all the members of the *tarwad*, *tavazhi* or *illom*, as the case may be, then living, whether he or she was entitled to claim such partition or not under the *Marumakkattayam* or *Nambudri* law applicable to him or her, and such share shall be deemed to have been allotted to him or her absolutely.

(2) When a Hindu to whom the *Aliyasantana* law would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an undivided interest in the property of a *kutumba* or *kavaru*, as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to the *Aliyasantana* law.

Explanation.— For the purposes of this sub-section, the interest of a Hindu in the property of a *kutumba* or *kavaru* shall be deemed to be the share in the property of the *kutumba* or *kavaru*, as the case may be, that would have fallen to him or her if a partition of that property *per capita* had been made immediately before his or her death among all the members of the *kutumba* or *kavaru*, as the case may be, then living, whether he or she was entitled to claim such partition or not under the *Aliyasantana* law, and such share shall be deemed to have been allotted to him or her absolutely.

(3) Notwithstanding anything contained in sub-section (1), when a *sthanamdar* dies after the commencement of this Act, the *sthanam* property held by him shall devolve upon the members of the family to which the *sthanamdar* belonged and the heirs of the *sthanamdar* as if the *sthanam* property had been divided *per capita* immediately before the death of the *sthanamdar* among himself and all the members of his family then living, and the shares falling to the members of his family and the heirs of the *sthanamdar* shall be held by them as their separate property.

Explanation.— For the purposes of this sub-section, the family of a *sthanamdar* shall include every branch of that family, whether divided or undivided, the male

members of which would have been entitled by any custom or usage to succeed to the position of *sthanamdar* if this Act had not been passed.

17. *Special provisions respecting persons governed by Marumakkattayam and Aliyasantana laws.*—The provisions of Sections 8, 10, 15 and 23 shall have effect in relation to persons who would have been governed by the *Marumakkattayam* law or *Aliyasantana* law if this Act had not been passed as if:

(*i*) for sub-clauses (*c*) and (*d*) of Section 8, the following had been substituted, namely:

"(c) thirdly, if there is no heir of any of the two classes, then upon his relatives, whether agnates or cognates";

(*ii*) for clauses (*a*) to (*e*) of sub-section (1) of Section 15, the following had been substituted, namely:

"(*a*) firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the mother;

(*b*) secondly, upon the father and the husband;

(*c*) thirdly, upon the heirs of the mother;

(*d*) fourthly, upon the heirs of the father; and

(*e*) lastly, upon the heirs of the husband.";

(*iii*) clause (*a*) of sub-section (2) of Section 15 had been *omitted*;

(*iv*) Section 23 had been *omitted*.

7. ACT NOT TO APPLY TO CERTAIN PROPERTIES [SECTION 5]

The Act, as the section provides, applies to all the properties belonging to a Hindu *except* the two categories specified in clauses (*i*) and (*ii*). These categories are therefore excepted from the application of this Act.

(*i*) *Category I* is, all properties succession to which is governed by the Indian Succession Act, 1925 (39 of 1925) by reason of the provisions contained in Section 21 of the Special Marriage Act, 1954 (43 of 1954).

And what does Section 21 of the Special Marriage Act, 1954, say? It provides that if a marriage is registered or solemnised under the Special Marriage Act, the property of the spouses devolves as per the provisions of the Indian Succession Act, 1925. But suppose if the spouses marry under the Hindu Marriage Act, their property would be regulated by the Hindu Succession Act.

However, it should be noted that due to insertion[8] of Section 21-A into the Special Marriage Act the legal position is now changed, that is, if both the parties to a civil marriage are Hindus, Section 21 will not apply; but if one of the parties to a civil marriage is a Hindu and the other party belongs to a religion other than that of a Hindu, Buddhist, Sikh or Jain, then Section 21 will apply. This changed legal position calls for an amendment in Section 5(1), which is not done so far, notes Dr Mahmood.[9]

(*ii*) *Category II* consists of "any estate which descends to a single heir by the terms of any covenant or agreement" entered into by —

(*a*) the ruler of any Indian State with the Government of India; or

---

8. By the Marriage Laws (Amendment) Act, 1976.
9. *Hindu Law*, (1981), pp. 345, 346.

(*b*) by the terms of any enactment passed before the commencement of this Act.

Part (*a*) of this category speaks of impartible estates, which, by reason of a covenant or agreement signed between the ruler of a former Indian princely State and the Government of India, would descend to a single heir. To this property the Hindu Succession Act would not apply.

Part (*b*) of this category speaks of impartible estates which enjoy statutory protection in case there is a special enactment for the same.

It should be noted that properties which are outside the preview of the above two categories, would be governed by the Hindu Succession Act. This opinion has been confirmed by the High Court of Patna in *Bhaiya Ramanuj case*[10].

In the beginning of this Act there was a third category of estates to which this Act did not apply. The third category referred to two properties to which the Hindu Succession Act did not apply. They were:

(*a*) the Valiamma Thampuran Kovilagam Estate, and

(*b*) the Palace Fund administered by the Palace Administration Board.

Since the State of Cochin merged into Kerala State, the Kerala State Legislature by an enactment[11] in 1961 partitioned the Estate and the Fund and provided therein that clause (*iii*) of Section 5 of the Hindu Succession Act, 1956 shall be omitted from the date of execution of the partition deed.

8. DEVOLUTION OF INTEREST IN COPARCENARY PROPERTY [SECTION 6]

(a) Scope and applicability

At the outset one must note that the section dissolves into four paras: Para one being the main provision. The main provision is followed by a proviso (para 2) and two Explanations (paras 3 and 4).

The section deals with and regulates the undivided coparcenary interest of a Mitakshara male. Other properties, for example, are:

(*a*) property governed by the Dayabhaga law,

(*b*) self-acquired property under the Mitakshara law, and

(*c*) joint family property governed by customary laws, or

(*d*) property allotted to a coparcener on partition[12]—

are not within its compass.[13]

---

10. *Bhaiya Ramanuj* v. *Lalu Maheshanuj*, AIR 1968 Pat 464.
11. Kerala Act 16 of 1961.
12. *Ramachandra Pillai* v. *Arunschalathammal*, (1971) 3 SCC 847, 850.
13. *Tirupurasundari* v. *Srinivasam*, AIR 1972 Mad 264.

Thus the section comes into operation only when the holder of a Mitakshara coparcenary interest died after the date of the commencement of this Act.[14] The section is not retrospective.

(b) Para one

As the section provides (para one) — if a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest therein devolves upon the surviving members of the coparcenary *by survivorship and not in accordance with this Act.*

(c) Para two

However, (as per the proviso, i.e. para 2) if the deceased had left behind him surviving:

(*a*) a female relative specified in Class I of the Schedule, or

(*b*) a male relative specified in Class I of the Schedule, who claims through such female relative,

the interest of the deceased in the Mitakshara coparcenary property devolves by testamentary or intestate succession, as the case may be, *under this Act, and not by survivorship.*

The section thus contemplates two different situations in regard to undivided coparcenary interest of a Mitakshara male dying after June 17, 1956. In situation number one (para one) the old Mitakshara law of survivorship will apply and in situation number two (para two) the new statutory law of succession will apply.

(d) Explanations

Explanation I clarifies that the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property which would have been allotted to him if a partition of the property had taken place before his death, irrespective of whether he was entitled to claim partition or not.

Explanation two further clarifies the situation laying down that (*i*) neither a person who has separated himself from the coparcenary, before the death of the deceased, nor (*ii*) any of his heirs can claim a share in the interest of a Mitakshara coparcenary property on intestacy as per the proviso referred to above.

There were different opinions of different High Courts as to the working and application of these two explanations. But in 1978 the decision in *Gurupad case*[15]

---

14. That is after June 17, 1956.
15. *Gurupad Khandappa Magdum* v. *Hirabai Khandappa Magdum*, (1978) 3 SCC 383: AIR 1978 SC 1239.

by the Supreme Court of India put an end to this conflict, approving the viewpoint of the Mumbai High Court in *Sushilabai* v. *Narayanrao*[16].

In *Gurupad case*[15] a coparcener died leaving behind his widow, two sons and three daughters. The Court decided that (*a*) on a notional basis the deceased, his wife and two sons would be actually allotted 1/4th share each. (*b*) Out of the 1/4th allotted to the deceased, the widow of the deceased, two sons and three daughters each would take 1/4th x 1/6th = 1/24th and (3) consequently the widow and the two sons would be getting 1/4th + 1/24th, i.e. 7/24th each and each of the three daughters would each get 1/24th[17].

As laid down in the above case, Explanation one provides a fictional expedient, namely, that the share of a Mitakshara coparcener shall be deemed to be a share in the property that would have been allotted to him if a partition had taken place immediately before his death. In this case it was assumed therefore that a partition had in fact taken place between the deceased and his coparceners immediately before his death. The inevitable corollary of this position is that the heir will get his earlier share in the interest which the deceased had in coparcenary property at the time of his death, in addition to the share which he or she received or must be deemed to have received in the notional partition.

This decision is to be treated as an authority for the position that when a female member who inherits an interest in the joint family property under Section 6 of the Act files a suit for partition expressing her willingness to go out of the family she would be entitled to get both, the interest she has inherited and the share which would have been notionally allotted to her as stated in Explanation one to Section 6 of the Act. However, it must be remembered that she does not cease to be a member of the family on the death of a male member of the family whose interest in the family property devolves on her without her volition to separate herself from the family.[18]

---

16. AIR 1975 Bom 257.
17. Reiterated in the *State of Maharashtra* v. *Narayan Rao*, (1985) 2 SCC 321; *Thimmaiah* v. *Ningamma*, (2000) 7 SC 409; *Shyama Devi* v. *Manju Shukla*, (1994) 6 SCC 342; *Raj Rani* v. *Chief Settlement Commr.*, (1984) 3 SCC 619. See *Raja Rani* v. *Radhey Shyam*, (1994) 1 HLR 678 (P&H); *Putamma* v. *H.K. Ramagowda*, (2004) 2 HLR 37 (Kant); *Neelawwa* v. *Basappa*, AIR 1982 Kant 126. In *Neelavva* v. *Bhimavva*, AIR 1982 Kant 307 the Karnataka High Court applied this principle without noting the Supreme Court case. *Shyama Narain Dayal* v. *Leela Devi*, (2000) 2 HLR 516 (Pat).

    In the beginning the Bom HC held in *Shriramabai* v. *Kalgonda*, AIR 1964 Bom 263: 1964 Mah LJ 407: 66 Bom LR 351, that the right of a mother to get a share in partition is abrogated by Section 4 of the HSA. But later on it rejected this ruling and held that a female entitled to a share on partition would get her share on a notional partition under Explanation I of Section 6 (*Rangubai* v. *Laxman*, AIR 1966 Bom 169: ILR 1966 Bom 728: 68 Bom LR 74; *Sushilabai* v. *Narayanrao*, AIR 1975 Bom 257: 1975 HLR 348: 77 Bom LR 556: 1975 Mah LJ 682.) The Orissa HC & the Gujarat HC also have held that the mother gets her share on partition. *Anand* v. *Haribandhu*, AIR 1967 Ori 94; *Vidyaben* v. *Jagadish Chandra Nandshankar Bhatt*, AIR 1974 Guj 23: 14 Guj LR 328.
18. *State of Maharashtra* v. *Narayan Rao*, (1985) 2 SCC 321, 330, 331.

This mode of enforcing the provisions of Section 6 is rather progressive but as criticised by Dr Mahmood[19] "what was meant to be a fiction necessary to be adopted for implementing the second main part of Section 6[20] has in itself become the principal provision of that section".

The provisions of this section influence other branches of Hindu law also, namely joint family, adoption and maintenance. Moreover where a Mitakshara coparcener dies, the coparcenary will not disrupt; the surviving coparceners will continue as a joint family without having partition.

A gift by a coparcener of his undivided coparcenary interest to another coparcener without the consent of other coparceners is void.[21]

As observed by the Madhya Pradesh High Court in *Chandradatta case*[22] the Hindu Succession Act has left undisturbed the law relating to Mitakshara coparcenary and coparceners, as it was in force prior to the commencement of the Act, except in so far as that law is modified by Section 30 and the proviso to Section 6 of the Act.

(e) Illustrations

(*i*) *X*, *Y* and *Z* are members of a joint Hindu family. *X* dies leaving behind his grandmother *D*. The undivided interest of *X* shall devolve on *Y* and *Z*, the surviving coparceners, while *D* shall only be entitled to maintenance as a member of the joint family, for she is not an heir specified in Class I of the Schedule to the Act.

(*ii*) *X* governed by the Mitakshara School inherits certain property from his father. *X* dies intestate leaving his widow *Y* and son *Z*. *X*'s widow is a relative specified in Class I. Consequently *X*'s undivided interest will not devolve upon *Z* by survivorship; it will devolve upon *Y* and *Z* in equal shares. *See* Sections 6, 8, 10. If *X* has separate property it will also devolve by succession upon *Y* and *Z* in equal shares.

9. DEVOLUTION OF INTEREST IN THE PROPERTY OF A TARWAD, TAVAZHI, KUTUMB, KAVARU OR ILLOM [SECTION 7]

(a) General

Like interest in Mitakshara joint family property, there are interests in other kinds of joint family property in South-West India known as *Tarwad*, *Tavazhi*, *Kutumb*, *Kavaru* or *Illom*. *Marumakkattayam* and *Aliyasantana* systems of inheritance obtain in Malabar region (Kerala) and in Canara district. In both these systems descent was traced in the female line. The above systems are known as Malabar Joint Family Systems. These Matriarchal systems are not explained or defined in the Act.

---

19. *Hindu Law*, p. 356.
20. That is para two.
21. *Thamma Venkata Subamma* v. *Thamma Rattamma*, (1987) 3 SCC 294.
22. *Chandradatta* v. *Sant Kumar*, 1972 Jab LJ 917: 1973 MPLJ 7.

(b) The Marumakkattayam and the Aliyasantana law

The *Aliyasantana* law is followed in South Canara by the Tulu landowners, cultivators and labourer castes and also by the Moplahs. These Moplahs are the descendants of Arab settlers who had connections with Tulu women. They accepted the prevailing rules of inheritance. In this law a family is termed as *Kutumb*. Sub-divisions in a family are called *Kavaru*. The *Aliyasantana* succession is governed by Section 17.

By sub-sections (1) and (2) (of Section 7), the language whereof is exactly the same, two specific provisions are made for the joint family under the *Marumakkattayam* law and the *Aliyasantana* law. It is provided that—

On the death of the holder of an undivided interest in a Malbar joint family, whether it is (*i*) a *Tarwad* or *Tawazhi* (of the *Marumakkattayam* law); or (*ii*) a *Kutumb* or *Kavaru* (of the *Aliyasantana* law); or (*iii*) an *Illom* (of *Nambudri* law), or (*iv*) a matrilineal joint family of any other customary law (e.g. *Thiyyas*) — the interest will be governed unconditionally by this Act. The old law which was applicable prior to the commencement of this Act will now no more apply to it. An ordinary *tarwad* consists of the mother, her children, male and female. The children of such females and their descendants in the female line, up to any degree of descent living under the control and direction of the *Karanvan*, who is the eldest male member.[23]

Section 7 like Section 6 comes into operation when the holder of an interest in a Tarwad, etc. dies and the mutual rights of the living members are governed by the respective local laws. The interest referred to in Section 7 is regulated by the provisions of Sections 8, 10 and 15 of the Act and the same would be ascertained on the basis of a notional partition (per capita) of the joint family property just before the death of the deceased holder. The interest which is ascertained or calculated would be absolutely taken by the heirs under the Act.

Mitakshara and Marumakkattayam: Points of Similarities

(*i*) Both recognise the right by birth, (*ii*) the property of both is joint and has unity, (*iii*) In both the system of family is that of a joint family and (*iv*) In both, the rule of survivorship obtains.

Points of Contrasts:

(1) The *Mitakshara* joint family is patriarchal.	(1) The *Marumakkattayam tarwad* is matrilineal.
(2) Gives right by birth only to the male descendants.	(2) Gives right by birth to male and female both.
(3) The right is limited upto the 4th	(3) This system admits no limits of

23. *Padmavathy Amma* v. *Ammunni Panicker*, 1995 Supp (3) SCC 352; *K.K. Kochuni* v. *States of Madras and Kerala*, AIR 1960 SC 1080: (1960) 3 SCR 887. A *tarwad* has branches and sub-branches from its female members. The family of an individual female member is called "*Tawazhi*". There are many *Tawazhis* in a *tarwad*. Marumakkattayam *tarwad* is a creation of law like a *Mitakshara* joint family.

degree of generation from a common living ancestor.	generation on this right.
(4) Gives right to a son by birth. The right is equal to his father's interest in the joint property. Consequently the remoter one goes from the common living ancestor the lesser his right will be.	(4) Under this system all the members get equal shares.

(c) Sthanam property

Sthanam property till now, before the commencement of the Act, had a special impartible character. It has the characteristics of a Hindu Woman's estate.[24] Now the Act abrogates that character and this property becomes the subject of division among the *Sthanamdar* family members and the heirs of the *Sthanamdar* living at the time of the *Sthanamdar's* death. These persons would hold their shares as their separate and absolute properties.

(d) Special provisions in regard to persons governed by Marumakkattayam and Aliyasantana laws [Section 17]

Section 17 is specially designed to apply to persons who, before the commencement of this Act, were governed by the *Marumakkattayam* law or by the *Aliyasantana* law. It does not apply to *Nambudris*.[25]

In its application Section 17 makes express modifications in Sections 8 and 15 and omits Section 23. By modifying Section 8 the Act combines agnates and cognates of the deceased as a single class of heirs who inherit together from a male intestate who was governed by the above-referred two laws. By modifying Section 15 the Act classifies property left by a female into two divisions: (1) property inherited by a woman from her husband or from her father-in-law, and (2) the rest of the property.

Section 23 is omitted so that where the property is left by a male intestate, (who was, before the commencement of this Act, governed by the above-referred two laws) it will be taken by his Class I male and female heirs under Section 8 of the Act and Section 23 will not apply in that case.

Modified scheme of heirs to the property of a Hindu male in case of Marumakkattayam and Aliyasantana systems of law [Section 17]

Class I heirs,—Son, daughter, widow, mother, predeceased son's son, daughter and widow, and predeceased daughter's son and daughter.

---

24. *A. Balkrishna Menon* v. *Inspecting Asstt. Commr.*, AIR 1969 Ker 1: ILR (1968) 1 Ker 261: 1968 Ker LT 846 (FB). See also *Revathinnal B. Varma* v. *Padmanabha Dasa*, 1993 Supp (1) SCC 233 (incidents of Sthanam and its properties.)
25. These expressions are defined in S. 3 of the Act.

Class II heirs.— (*i*) Father;

(*ii*) Son's daughter's son, son's daughter's daughter, brother, sister;

(*iii*) Daughter's sons, daughter son's daughter, daughter's daughter's daughter, daughter's daughter's son.

(*iv*) Brother's son, sister's son, brother's daughter, sister's daughter;

(*v*) Father's father, father's mother;

(*vi*) Father's widow, father's sister;

(*vii*) Mother's father, mother's mother; and

(*viii*) Mother's brother, mother's sister.

Class III heirs.— Agnates and cognates of the deceased.

Class IV heirs.— Government by escheat.[26] (*See* Section 29).

Modified scheme of heirs in case of a Hindu female in case of Marumakkattayam and Aliyasantana systems of law [Section 17]

1. (*a*) Son, (*b*) daughter, (*c*) Predeceased Son's daughter and son, (*d*) Predeceased daughter's son and daughter, (*e*) Mother.
2. (*a*) Father, (*b*) husband.
3. Heirs of the mother
4. Heirs of the husband.

It should be noted that in entry 1 the mother of the intestate Hindu female is placed along with the children and the husband. In entry 2 the father and husband are placed on par with each other. If there are no heirs of entry 1, heirs of entry 2 succeed simultaneously and each takes one-half share in the property.

One may recall the three types of properties of a deceased Hindu female as mentioned under Section 15 previously: i.e. (*a*) property inherited from her father and mother, (*b*) from her husband or father-in-law, and (*c*) any other or rest of the property.

Under this section there is no category (*a*). Consequently the property falls under categories (*b*) and (*c*) only.

In *Elambi Lakkat case*[27] a Thiyya died in 1960. She left behind a son and daughter. The Kerala High Court held that the daughter was entitled to one-fourth share.

Because of non-application of Section 23 to this system the female heirs have as much power to seek partition of a dwelling house, as the male heirs have.

---

26. *State of Punjab* v. *Balwant Singh*, 1992 Supp (3) SCC 108: AIR 1991 SC 2301: (1992) 2 Punj LR 102.
27. *Elambi Lakkat* v. *Marata Sennantheni*, AIR 1991 Ker 407.

[C]

GENERAL RULES OF SUCCESSION IN THE CASE OF MALES [SECTIONS 8-13 & 19]

10. TEXT: SECTIONS 8-13 & 19

8. *General rules of succession in the case of males.*— The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter:

(*a*) firstly, upon the heirs, being the relatives specified in Class I of the Schedule;

(*b*) secondly, if there is no heir of Class I, then upon the heirs, being the relatives specified in Class II of the Schedule;

(*c*) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(*d*) lastly, if there is no agnate, then upon the cognates of the deceased.

9. *Order of succession among heirs in the Schedule.*— Among the heirs specified in the Schedule, those in Class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in Class II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession.

10. *Distribution of property among heirs in Class I of the Schedule.*—The property of an intestate shall be divided among the heirs in Class I of the Schedule in accordance with the following rules:

Rule 1.— The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.

Rule 2.— The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule 3.— The heirs in the branch of each predeceased son or each predeceased daughter of the intestate shall take between them one share.

Rule 4.—The distribution of the share referred to in Rule 3:

(*i*) among the heirs in the branch of the predeceased son shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions; and the branch of his predeceased sons gets the same portion;

(*ii*) among the heirs in the branch of the predeceased daughter shall be so made that the surviving sons and daughters get equal portions.

11. *Distribution of property among heirs in Class II of the Schedule.*—The property of an intestate shall be divided between the heirs specified in any one entry in Class II of the Schedule so that they share equally.

12. *Order of succession among agnates and cognates.*— The order of succession among agnates or cognates, as the case may be, shall be determined in accordance with the rules of preference laid down hereunder:

Rule 1.— Of the two heirs, the one who has fewer or no degrees of ascent is preferred.

Rule 2.— Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent.

Rule 3.— Where neither heir is entitled to be preferred to the other under Rule 1 or Rule 2 they take simultaneously.

13. *Computation of degrees.*— (1) For the purposes of determining the order of succession among agnates, or cognates, relationship shall be reckoned from the intestate to the heir in terms of degrees of ascent or degrees of descent or both, as the case may be.

(2) Degrees of ascent and degrees of descent shall be computed inclusive of the intestate.

(3) Every generation constitutes a degree either ascending or descending.

19. *Mode of succession of two or more heirs.*— If two or more heirs succeed together to the property of an intestate, they shall take the property —

(*a*) save as otherwise expressly provided in this Act, *per capita* and not *per stirpes*; and

(*b*) as tenants-in-common and not as joint tenants.

11. GENERAL

Sections 8 to 13 and 19 of the Act contain a group of general rules of succession in case of a male "dying intestate", that is to say without having made a valid Will of his property. The Act also gives different rules of succession for the devolution of property of a female dying intestate (*see* Sections 15 and 16, *infra*). As laid down by the case of *Satyanarayan* v. *Seethamma*[28] the words "dying intestate" in this section are descriptive of the status of the deceased; they have no reference to the time of the death of the person deceased. This view is fortified by the Supreme Court in *Manshan case*[29] where the Court said that these words cover two situations, namely (*i*) where the person dies without any Will at all, or (*ii*) where he dies after having made an invalid Will.

When a male Hindu dies intestate, the following questions would naturally arise in regard to succession to his property. They are (*a*) who would be the heirs of the deceased male? (*b*) How do we classify them? and (*c*) What about the order of priority between these various classes into which the heirs are classified? Section 8 answers these questions in general and the other sections, i.e., Sections 9, 10, 11, 12, 13 and 19 and the Schedule to the Act supply detailed answers.

12. WHEN DOES SECTION 8 APPLY?

Unless the following requirements are satisfied, Section 8 would not apply:

(*i*) There must be death of a male, (*ii*) the male must be a Hindu, (*iii*) he has left behind some "property", (*iv*) he has not made any valid will in regard to his property, and (*v*) the male has died after the coming into operation of the Hindu Succession Act.

One must note that if the deceased is a woman, Section 8 will not apply, but Section 15 would apply. "Property" is not defined in the Act but in a wide sense

---

28. AIR 1972 Mys 247.

29. *Manshan* v. *Tej Ram*, 1980 Supp SCC 367: AIR 1980 SC 558; *Parma Nand* v. *Satya Deo*, As expressed by the Judicial Committee of the PC in *Lala Duni Chand* v. *Amar Kali*, AIR 1946 PC 173: (1945-46) 73 IA: 226 IC 420 the expression dying intestate does not refer to any time of death of the propositus, it describes only the status of the deceased. This was approved by the Supreme Court of India in *Fateh Bibi* v. *Charan Dass*, (1970) 1 SCC 658: AIR 1970 SC 789. Succession opens on the date of the death of the deceased. See *Saroop Singh* v. *Banto*, (2005) 8 SCC 330.

it includes self-acquired and separate property of the deceased, his undivided interest in a *Mitakshara* coparcenary, his interest in *Tarwad*, *Tawazhi*, etc., his Sthanam property, his share in Dayabhaga joint family property, property received on a family partition and coparcenary property held by a sole surviving coparcener. It has been held by the Punjab and Haryana High Court that compensation payable to the relations of persons who are killed during a riot is also property under this section.[30]

Justice Punchhi in *Narasimaha Murthy* v. *Sushila Bai*[31] has arranged these heirs in the following manner:

Males	*Females other than Daughters*	*Females who are Daughters*
(1)	(2)	(3)
(*i*) Son	(*i*) Mother	(*i*) Daughter
(*ii*) Son of predeceased son	(*ii*) Widow	(*ii*) Daughter of predeceased son
(*iii*) Son of predeceased son of predeceased son	(*iii*) Widow of predeceased son	(*iii*) Daughter of predeceased son of predeceased son
(*iv*) Son of predeceased daughter	(*iv*) Widow of predeceased son of predeceased son	(*iv*) Daughter of predeceased daughter

As held in *K. V. Kishore case*[32] these heirs acquire a rested right to the definite quantified shares in the property left lay the deceased.

13. CLASSIFICATION OF HEIRS

The section and the Schedule classify the heirs of a male Hindu as under:

(*i*) heirs of Class I (*see* Schedule);

(*ii*) heirs of Class II (*see* Schedule);

(*iii*) agnates of the deceased; and

(*iv*) cognates of the deceased.

The first two classes are specified in the Act but the rest are nowhere specified in the Act.

(a) Class I heirs

The following are Class I heirs:

---

30. *Naraini Bai* v. *State of Haryana*, (2004) 1 HLR 478 (P&H DB). Similarly compensation payable due to an accident or casualty or injury sustained due to police firing, political murder, stampede etc. will also be property under this section. (*Modern Hindu Law*, p. 846).
31. (1996) 3 SCC 644, para 29.
32. *K. V. Kishore* v. *Appropriate Authority, Income Tax*, (1991) 2 HLR 249 (Mad).

(*i*) son,

(*ii*) daughter,

(*iii*) widow,

(*iv*) mother,

(*v*) son of a predeceased son (p/s)

(*vi*) daughter of a p/s

(*vii*) son of a predeceased daughter (p/d)

(*viii*) daughter of a p/d

(*ix*) widow of a p/s

(*x*) son of a p/s of a p/s

(*xi*) daughter of a p/s of a p/s

(*xii*) widow of a p/s of a p/s.

Out of these 12 relations 4 are males and 8 are females. The 4 males are:

(*i*) The son of the propositus;

(*ii*) his son's son;

(*iii*) his son's son's son;

(*iv*) his daughter's son.

As sub-section (*b*) lays down, in the absence of any heirs in Class I the heirs in Class II in the Schedule succeed to the property of the deceased.[33]

(b) Class II heirs

These Class II heirs are as under—

In Class II there are twenty-three heirs. Out of these 12 are females and 11 are males. They, unlike Class I heirs, constitute a single group in which none excludes any other and which is further divided into 9 groups, called "entries".

(*i*) father of the propositus;

(*ii*) (*a*) Son's daughter's son;

(*b*) Son's daughter's daughter;

(*c*) Brother;

(*d*) Sister;

(*iii*) (*a*) Daughter's son's son;

(*b*) Daughter's son's daughter;

---

33. *Her Jesa Kachra* v. *M.J. Lakhman*, AIR 1979 Guj 45: (1979) 20 Guj LR 64; *Devi Ram* v. *Shanti Devi*, (2004) 2 HLR 9 (P&H); *Arunachalathammal* v. *Ramachandran Pillai*, AIR 1963 Mad 255: ILR 1963 Mad 778: (1963) 1 Mad LJ 254.

(*c*) Daughter's daughter's son;

(*d*) Daughter's daughter's daughter;

(*iv*) (*a*) Brother's son;

(*b*) Sister's son;

(*c*) Brother's daughter;

(*d*) Sister's daughter;

(*v*) (*a*) Father's father;

(*b*) Father's mother;

(*vi*) (*a*) Father's widow;

(*b*) Brother's widow;

(*vii*) (*a*) Father's brother;

(*b*) Father's sister;

(*viii*) (*a*) Mother's father;

(*b*) Mother's mother;

(*ix*) (*a*) Mother's brother;

(*b*) Mother's sister.

(c) Notable points

In respect of Class I heirs:

Looking to the Table it is evident that there are only four primary heirs — who take property in their own rights. They are: mother, widow, son and daughter. The remaining eight heirs represent or would have represented a primary heir if the primary heir — he or she — had not died before the propositus.

The principle of representation goes up to two degrees in the male line of descent while in the female line of descent it goes only up to one degree.

Regarding ascendants of the propositus only his mother is a Class I heir; all other heirs (except the widow of the propositus) are his descendants or their widows.

In *Subbaiyyajoga Naik* v. *Narayani*[34] and *Naraini Bai* v. *State of Haryana*,[35] the issue involved was as to the right of the married daughters to succeed as heirs. In the first case[36] a father died intestate leaving self-acquired properties. A married daughter's right to inherit the properties was challenged on the ground that she had been married 20 years back. Relying on *P.S. Sairam*

34. AIR 2004 Kant 430.
35. AIR 2004 P&H 206.
36. *Subbaiyyajoga Naik* v. *Narayani*, AIR 2004 Kant 430.

v. *P.S. Rama Rao Pisey*[37] the trial court held that a daughter ceases to be a member of her father's family on marriage and becomes a member of the husband's family and hence she is not entitled to a share. On appeal the order was set aside holding that even though married, a daughter is entitled to a share in the self-acquired properties of her father as a Class I heir[38]. In *Naraini Bai*[39] the question that cropped up was whether the Government could deny payment of compensation for the death of parents who were killed during the 1984 riots to their married daughter. The Haryana Government had taken a policy decision to pay *ex gratia* compensation to the heirs of those killed in the riots. While the petitioner brother was given 50 per cent compensation of Rs 1,65,000 for each of the deceased parents, the payment of balance 50 per cent compensation to the daughter was denied inter alia, on the ground that she was already married before the 1984 riots. The court, however, held that the denial was arbitrary as under Sections 8 and 15, she is a Class I heir as mentioned in the Schedule attached to Section 8 and also an heir as mentioned in Section 15(1)(*a*). Parliament has not made any distinction between an unmarried daughter and a married daughter, according to the court, and so she is entitled to succeed to the properties of the mother as well as the father. The term "compensation" was held to be covered within the meaning of the word "property" in Sections 8 and 15.[40]

Widows of predeceased son and grandson are Class I heirs, but the husband of a deceased daughter or granddaughter is not an heir at all.

In regard to Class II heirs:

In this class it will be seen that there are only three primary heirs who take property in their own rights. They are: father of the propositus (group *i*), his brother (group *ii*) and his sister group (*ii*). The remaining twenty heirs of Class II represent one or the other of Class I or Class II heirs.

Regarding the parents of the propositus, his mother is in Class I but his father is a Class II heir. Similarly if one looks at the great-grandchildren of the deceased's, son's son's children they are Class I heirs, but his daughter's children are Class II heirs.

All grandchildren of daughters are Class II heirs but among son's grand children some are in Class I and some are in Class II.

A stepmother and brother's widow are Class II heirs while stepfather and sister's husband are not heirs at all.

---

37. ILR 2001 Kant 2209.
38. See *P.S. Sairam* v. *P.S. Rama Rao Pissey*, (2004) 11 SCC 320: AIR 2004 SC 1619: (2004) 2 CHN 184.
39. *Naraini Bai* v. *State of Haryana*, AIR 2004 P&H 206.
40. XL ASIL (2004) at p. 279.

(d) Class III and Class IV heirs

As laid down by Section 8 the property of a male Hindu dying intestate shall devolve firstly upon Class I heirs. If there is no heir of Class I it will devolve upon Class II heirs. If there is no heir of Class I or II, the same will devolve upon the agnates of the deceased (as defined by Section 3 of the Act) which, for convenience, may be termed as Class III heirs and if there is no agnate, the property would devolve upon the cognates of the deceased (as defined by Section 3), which may be termed as Class IV heirs.

Section 8 thus mentions four classes of heirs and prescribes the order of preference between them. Consequently (*i*) Class I heirs wholly exclude Class II, III and IV, (*ii*) Class II heirs wholly exclude Class III and IV, and (*iii*) Class III wholly exclude Class IV (unless the deceased was, legally, a follower of the Marumakkattayam or Aliyasantana law). If a single heir of class one is living when the propositus dies, no heir of Class II, III or IV has any chance.

The operation of Section 8 is not retrospective. The language of the section does not suggest anywhere that it has retrospective operation. The opening sentence of Section 8 indicates that the property which is provided for by this section must be the property of a person who dies after the commencement of the Act. The language of the sentence may be construed with the opening words of Section 6.[41] Thus the reference in Section 6 is clearly to the time of death, while in Section 8 it is only to the fact of intestacy. From these sections two points follow: (1) Succession opens on the death of the limited owner, and (2) the law then in force would govern the succession.[42]

Section 8 will apply in preference to the customary law of the parties.[43]

Where a share is to be claimed by way of inheritance, the plea for that must be made at the first instance and all the heirs must be impleaded as parties in the suit.[44]

14. ORDER OF SUCCESSION AMONG HEIRS IN THE SCHEDULE [SECTION 9]

Section 9 lays down that those heirs in Class I shall take simultaneously and to the exclusion of all other heirs. In other words Class I heirs form one group of heirs and succeed as a body. So long as there is a single heir in Class I, heirs mentioned in Class II will be excluded. Thus heirs in Class I succeed in preference to all others mentioned in Class II.

For example, if a male dies intestate, leaving only a daughter surviving him, the daughter appears in Class I heirs and she therefore succeeds in preference to the father who appears in entry one of Class II. It is thus evident that the intention of the makers of law is to plan out a line of succession that is based

---

41. *Eramma* v. *Veerupana*, AIR 1966 SC 1879.
42. *Daya Singh* v. *Dhan Kaur*, (1974) 1 SCC 700, 705.
43. *Ibid.*
44. *Nihil Kaur* v. *Dhan Kaur*, (2004) 2 HLR 376 (P&H).

upon *nearness of relationship* and *presumed natural affection* of the deceased without any distinction between persons standing in the same degree of relation merely by the reason of sex or by reason of any principle of superiority of one born through a male over another born through a female.

15. DISTRIBUTION OF PROPERTY AMONG HEIRS IN CLASS I [SECTION 10]

(a) Rules

As said above the heirs in Class I take simultaneously but as the law lays down in Section 10, their shares are not equal. Their shares are to be determined in accordance with the rules laid down by the section. These rules are four in number.

Rule 1.— The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.

Rule 2.— The surviving sons and daughters and the mother of the intestate shall each take one share.[45]

Rule 3.— The heirs in the branch of each predeceased son or each predeceased daughter of the intestate shall take between them one share.

Rule 4.— The distribution of the share referred to in Rule 3 —

(*i*) among the heirs in the branch of the predeceased son shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions; and the branch of his predeceased sons gets the same portion.

(*ii*) among the heirs of the branch of the predeceased daughter shall be so made that the surviving sons and daughters get equal portions.

The rules abovesaid are to be read and understood in the light of the provisions contained in Section 19 which lay down a general rule that subject to any express provision to the contrary if two or more heirs succeed together to the property of any intestate, they shall take the property.

(*i*) *per capita* and not *per stirpes*; and

(*ii*) as *tenants-in-common* and not as *joint tenants*.

The expressions "*per capita*" and "*per stirpes*" and "tenants-in-common" and "joint tenants" are explained in Chapter XIII, note D, sub-notes 9 and 10.

As observed by the Madras High Court[46] prior to the Hindu Succession Act of 1956 the co-widows of a Hindu male had a joint interest in the estate of the deceased and no one of them had the right to represent the estate without the other/others. But now under the Act the limited interest is declared as an

---

45. *Raj Rani* v. *Chief Settlement Commr.*, (1984) 3 SCC 619; *Anand Dev Puri* v. *Gurigbal Singh*, (1996) 1 SCC 164; *Syam Narain Dayal* v. *Leela Devi*, (2000) 2 HLR 516 (Pat).

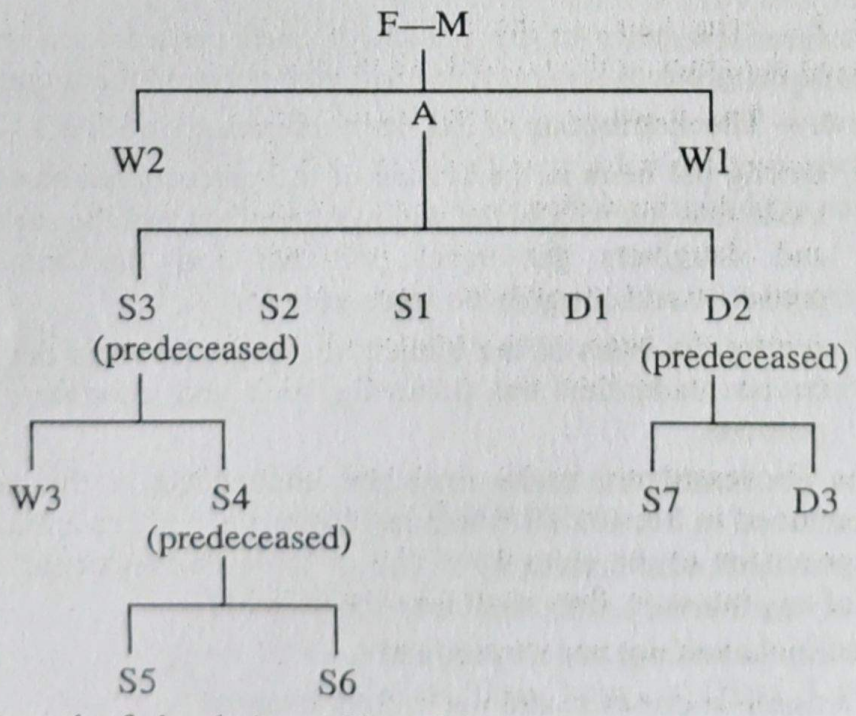
46. *Sundarammal* v. *Sadasiva Reddiar*, AIR 1959 Mad 349.

absolute one and the joint estate is not recognised. Consequently the co-widows become co-tenants of their absolute estate and on the death of one of them her share will go to her heirs and not to other widows by survivorship,[47] and one of them can institute proceedings in her own right against any trespasser.[48]

(b) Illustrations

(*i*) *A* dies and leaves behind him his widow *W*, two daughters *D*1 and *D*2 and one son *S*. Here as per Section 9 all the four take simultaneously as they are all Class I heirs. The property will therefore be divided into 4 shares and *W* will take 1/4th share and *D*1 and *D*2 will take 1/4th share each and son *S* would get 1/4th share.

(*ii*) *A* dies leaving father *F*, mother *M*, two widows *W*1 and *W*2, two sons *S*1 and *S*2 and widow *W*3 of a predeceased son *S*4 of a predeceased son *S*3, two sons *S*5 and *S*6 of a predeceased son *S*4 of a predeceased son *S*3, daughter *D*1, son *S*7 of a predeceased daughter *D*2, daughter *D*3 of a predeceased daughter *D*2, as shown below:



Here, the father being a Class II heir will be excluded by the other heirs who all belong to Class I and take simultaneously.

Among the Class I heirs the mother *M*, sons *S*1 and *S*2 and daughter *D*1 shall each take one share. Widows *W*1 and *W*2 shall each take 1/2 share (both together taking one share).

47. *Mani* v. *Rama Krishna*, 1970 Mah LR (Notes) 23 (Bom); *Nagma Naicker* v. *Ponnuchinnayyan*, ILR (1969) 2 Mad 507.
48. *Sundarammal* v. *Sadasiva Reddiar*, AIR 1959 Mad 349.

Daughter's son *S*7 and daughter's daughter *D*3 shall also take 1/2 share each (both together taking one share).

Great grandsons *S*5 and *S*6 and widow *W*3 of the grandson *S*4 shall each take 1/3rd share (all the three together taking one share).

Consequently the property will be divided into 7 shares and allotted, as follows:

*M*1, *S*1, *S*2, *D*1 — will have 1/7th share each.

*W*1, *W*2, *S*7, *D*3 — will have 1/14th share each.

*S*5, *S*6, *W*3 — will have 1/21st share each.

(*iii*) A dies leaving behind a brother, a sister and a son's daughter.

Here they each take 1/3rd share in the property.

16. DISTRIBUTION OF PROPERTY AMONG HEIRS IN CLASS II [SECTION 11]

Regarding distribution of property among Class II heirs it is provided that heirs specified in any particular entry of Class II are to take it in equal shares. The heirs of a prior entry are preferred to those in a latter entry, there is no priority or precedence as regards heirs mentioned in the same entry.

17. DISTRIBUTION OF PROPERTY AMONG AGNATES AND COGNATES [SECTIONS 12 AND 13]

Section 12 provides rules for fixing the order of succession among the agnates and the cognates. These expressions have been defined in Section 3. In other words the section provides for these agnatic and cognatic relations of the propositus who do not fall in Class I and Class II. The section lays down three rules called the "rules of preference" according to which the order of succession among these Class III and Class IV heirs shall be determined. For understanding these rules one must seek assistance from Section 13, which provides for computation of degrees of relationship in terms of degrees of ascent and degrees of descent. Each generation constitutes a degree.

Section 12 does not provide us with a detailed order of succession. Its rules decide and determine a preference between two competing interests, i.e. competing heirs of different degrees. If analysed they may be read as follows:

(*i*) *fewer or no degree*: Between the two competing heirs the one who has *fewer or no degrees of ascent is* preferred.

(*ii*) *degree of ascent*: Between the two competing heirs, if only one has degrees of ascent, the other heir who has *no degrees* of ascent shall be preferred.

(*iii*) *both, no degree of ascent*: Between the two competing heirs, if *both do not have degrees* of ascent, degrees of descent will be considered.

(*iv*) *degree of ascent same or none*: Between the two competing heirs, if the number of degrees of ascent is the same or none that one is preferred who has *fewer or no degrees of descent.*

(*v*) *degree of descent*: Where degrees of descent are to be considered and if only one heir has such degree, the other heir having no such degree will be preferred.

(*vi*) *both having degrees of descent*: Where both heirs have degrees of descent, the one having fewer such degrees will be preferred.

(*vii*) *neither heir preferred*: Where neither heir is entitled to be preferred to the other under Rule 1 or Rule 2, they take simultaneously.

Illustrations[49]

(*i*) *A* dies leaving a father's, father's brother's son and a father's brother's son. The latter who has two degrees of ascent will exclude the former who has three degrees of ascent.

(*ii*) *A* dies leaving a father's brother's son and father's brother's son's son. The former will exclude the latter, for though the number of degrees of ascent is the same, the former has few degrees of descent.

(*iii*) *A* dies leaving his son's daughter's son's son and a sister's daughter's son. The former who has no degree of ascent shall be preferred to the latter who has two degrees of ascent, the sister being the father's daughter.

(*iv*) *A* dies leaving sister's daughter's daughter and a maternal uncle's son's daughter. The former who has two degrees of ascent, shall be preferred to the latter who has three degrees of ascent, the maternal uncle being mother's father's son.

(*v*) *A* dies leaving father's mother's father and mother's father's father. Both cognates take simultaneously, for they have equal degrees of ascent namely four and there are no degrees of descent.

(*vi*) *A* dies leaving a sister's son's son and a sister's daughter's son. Both cognates take simultaneously for both have equal degrees of ascent, namely two, and equal degrees of descent, namely three.

18. COMPUTATION OF DEGREES [SECTION 13]

Section 13 lays down rules in order to determine the degrees of relationship between the intestate and his agnates and cognates. The section lays down three simple principles with the aid of which one can determine the order of succession among agnates and cognates.

(a) Rules

Briefly viewed these rules are as under:

(*i*) For determining the order of succession among agnates or cognates—relationship shall be reckoned from the intestate to the heir in terms of degrees of ascent or degrees of descent, or both.

---

49. P.N. Chadha: *Hindu Law*, Chap. 2, pp. 33-34.

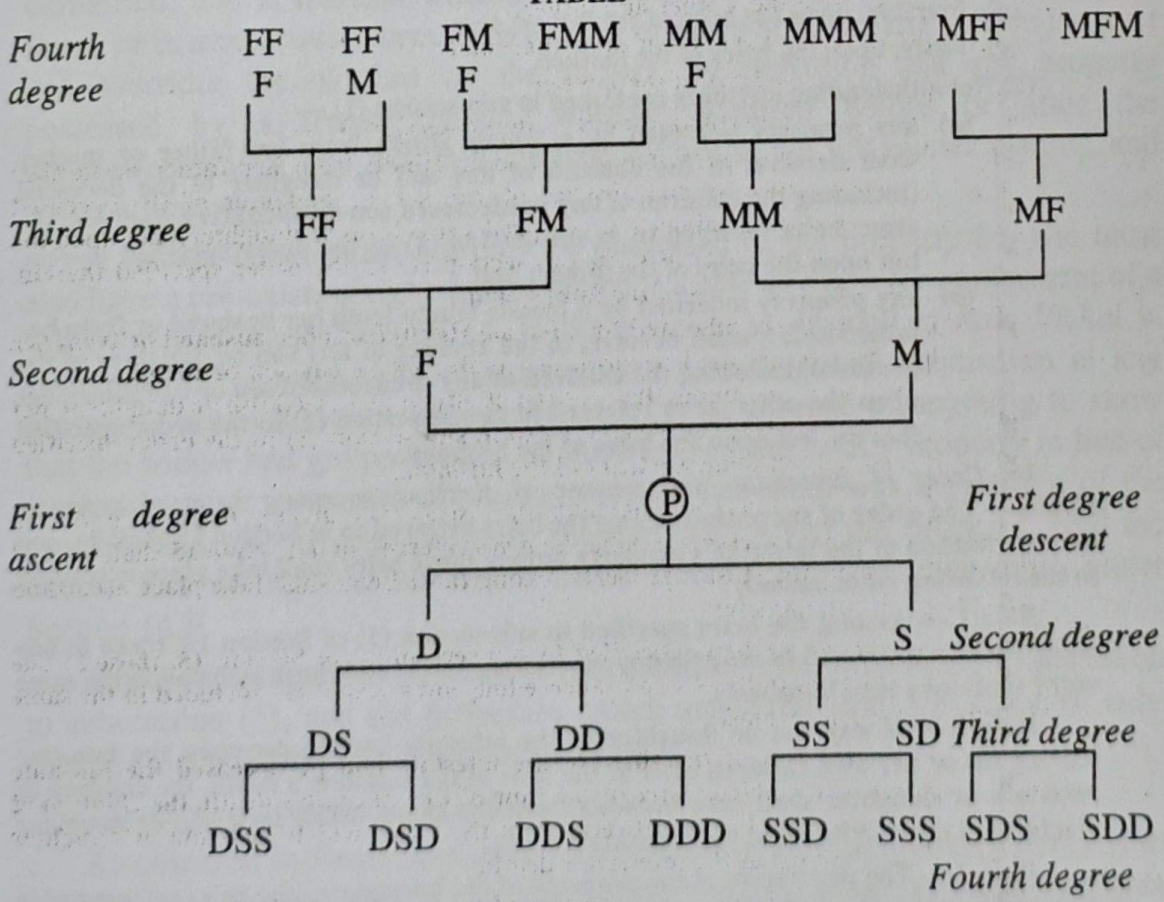
(*ii*) These degrees shall be computed inclusive of the intestate.

(*iii*) Every generation constitutes a degree either ascending or descending.

(b) Table

The section thus makes clear the meaning of degrees of ascent and degrees of descent. Accordingly parents stand in second degree of ascent in relation to their children and grandparents stand in third degree of ascent in relation to their grandchildren. Children stand in the second degree of descent to their parents. A simple table would make it very clear.

TABLE



[D]

PROPERTY OF A FEMALE HINDU AND RULES OF SUCCESSION IN HER CASE [SECTIONS 14, 15 & 16]

19. TEXT: SECTIONS 14, 15 & 16

14. *Property of a female Hindu to be her absolute property.*— (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

***Explanation.*— In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and**

also any such property held by her as *stridhana* immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

15. *General rules of succession in the case of female Hindus.*— (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16:—

(*a*) firstly, upon the sons and daughters (including the children of any predeceased son, or daughter) and the husband;

(*b*) secondly, upon the heirs of the husband;

(*c*) thirdly, upon the mother and father;

(*d*) fourthly, upon the heirs of the father; and

(*e*) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1),—

(*a*) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter), not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(*b*) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter), not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

16. *Order of succession and manner of distribution among heirs of a female Hindu.*— The order of succession among the heirs referred to in Section 15 shall be, and the distribution of the intestate's property among those heirs shall take place according to the following rules, namely:

Rule 1.— Among the heirs specified in sub-section (1) of Section 15, those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.

Rule 2.— If any son or daughter of the intestate had predeceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

Rule 3.— The devolution of the property of the intestate on the heirs referred to in clauses (*b*), (*d*) and (*e*) of sub-section (1) and in sub-section (2) of Section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or the husband's, as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death.

20. ABSOLUTE PROPERTY OF A FEMALE HINDU [SECTION 14]

(a) Scope and application

It is evident from reading Section 14 that the section dissolves itself into three parts: Part 1, i.e., sub-section (1) declares that:

"Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, *shall be held by her as full owner thereof and not as a limited owner.*"

Thus, Part I is of a declaratory nature. An Explanation attached to sub-section (1) explains the meaning of the word "property" occurring therein.

Sub-section (2) of this section is a saving clause which saves certain properties and excludes them from the application of sub-section (1).

As discussed in the earlier part of this book[50] under the old Hindu law various types of women's property (*Stridhana*) were contemplated. Succession to such property depended on some factors: whether she was married or unmarried, and if married whether her marriage was in one of the approved forms or in unapproved form. This section makes a bold departure from the past and overrides the old law on the subject, by providing that any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, is to be held by her as the full owner thereof, and not as a limited owner.

A female Hindu must not only be possessed of the property but she must also have a pre-existing right thereto which is a *sine qua non* for conferment of a full ownership under Section 14. In other words as decided in *Ram Vishal* v. *Jagan Nath*,[51] a mere right of maintenance without actual acquisition in any manner is not sufficient to attract Section 14. In absence of anything to show that the widow had got possession of share in the joint family property in lieu of maintenance, or in arrears of maintenance or that there was a partition of the property and that in such partition, she had been given the property, held the widow had no right at all which could fructify into full ownership under Section 14.[52]

The section regulates all kinds of properties as referred to in the Explanation to sub-section (1), and the properties which are saved from the scope of sub-section (1) are referred to in sub-section (2).

The section applies to a Hindu female.

As observed in *Prem Devi case*[53] the scheme of this section apparently is to give full proprietary rights to a Hindu woman where she had only limited rights by virtue of ancient Hindu law. However the section does not affect those rights which were received by her under a written instrument. The Act thus improves

---

50. *See* Chapters XI and XII, *supra*.
51. (2004) 9 SCC 302.
52. *Muthuammal* v. *Shanmuga Sundaran*, (2004) 13 SCC 650 (settlement deed in favour of a crippled daughter. Only a life interest was conferred. Held it would get converted into absolute interest as other daughters were already married prior to the commencement of the Hindu Succession (Tamil Nadu Amendment) Act, 1989, and had therefore no right to inheritance under S. 29-A of the Act. See also *Shakuntla Devi* v. *Kamla*, (2005) 5 SCC 390: (2005) 3 Mah LJ 578: (2005) 3 MPLJ 254.
53. *Prem Devi* v. *Director of Consolidation*, AIR 1970 All 238.

the legal status of a Hindu woman by enlarging her limited interest provided she was in possession of the property when this Act came into force.

Possession held may be actual or constructive or in any form recognised by law in its widest form, but possession there must be.

The section consequently had been applied to all properties including agricultural lands.[54]

(b) Section 14(1)

This section is applicable to Hindu females and does not have the effect of enlarging a limited estate in the hands of a Hindu male. The Hindu male will be entitled only to the limited rights as provided for under the law, that is applicable to him.[55]

The limited estate of a female Hindu has been enlarged into her full estate by this section. It has done away the irregularity between a man and a woman as regards their proprietary rights. This is thus a piece of gender justice aiming at the amelioration of her economic condition.[56] A female Hindu as explained by the Supreme Court[57] does not mean only "wife", to limit this expression only to wife will be an interpretation against the plain language of sub-section (1). It includes daughter as well.[58]

(c) "Property", "Acquisition" and "Possession": Meaning of

Property means "any property" and includes both movable and immovable property. It includes jewellery too. The word 'possessed' is used in a broad sense and in the context it means the state of owning or having in one's hand or power. . . . That possession might be actual or constructive in any form recognised by law.[59]

Regarding the source of acquisition of property the Explanations make it clear that "property" includes —

property acquired (*a*) by inheritance, (*b*) by devise, (*c*) at a partition, (*d*) in lieu of maintenance, (*e*) by gift from any person whether a relative or not, before, at or after marriage, (*f*) by her own skill or exertion, (*g*) by purchase, (*h*) by prescription, or (*i*) in any other manner, whatsoever; and also (*j*) any such property held by her as Stridhana immediately before the commencement of the Act.

---

54. *Jagannathan Pillai* v. *Kunjithapadam Pillai*, (1987) 2 SCC 572, 577; *Amar Singh* v. *Baldeo Singh*, AIR 1966 Punj 666 (FB).
55. *Sundari* v. *Laxmi*, (1980) 1 SCC 19.
56. *Bai Vanita* v. *Thakorbhai Chelabhai*, (1979) 3 SCC 300; *Eramma Veerupana*, AIR 1966 SC 1879; *Kalawatibai* v. *Sairabai*, (1991) 3 SCC 410; *Prema Bai* v. *Hukum Chand*, (1992) 1 HLR 564 (MP).
57. *Vidya* v. *Nandram*, (2001) 10 SCC 747.
58. *Jose* v. *Ram Krishnan Nair*, (2004) 1 HLR 668 (Ker DB).
59. *Gummalapura Taggina Matada Kotturuswami* v. *Setra Veeravva*, AIR 1959 SC 577, 581-82 — followed in *Doraibabu* v. *K. Masilamani*, (1992) 1 HLR 480 (Mad DB) and other cases.

The object of these provisions is crystal clear and that is to confer a benefit on Hindu females by enlarging their *limited interest* in the property inherited or held by them into an *absolute interest* with *retrospective effect*,[60] in the sense that not merely property acquired and held by a female after the commencement of this Act, but also *property already acquired by her in the past and possessed by her* gets impressed with the incidents of absolute property.[61]

As observed by the Supreme Court of India in *Partap Singh case*[62] Section 14(1) was enacted to remedy to some extent the plight of a Hindu woman who could not claim absolute interest in the properties inherited by her from her husband but who could only enjoy them with all the restrictions attached to a widow's estate under the Hindu law.[63]

There is now hardly any justification for males belonging to the Hindu community to raise any objection to the beneficent provisions contained in Section 14(1) of the Act on the ground of hostile discrimination. The above provision is further protected by the express provision contained in clause 3 of Article 15, since it is a special provision enacted for the benefit of Hindu women.

The expression "any property possessed by a Hindu female whether acquired before or after the commencement of the Act" in sub-section (1), on an analysis yields to the following interpretation:

(1) Any property possessed by a Hindu female *acquired before* the commencement of the Act will be held by her as a full owner thereof and not as a limited owner.

(2) Any property possessed by a Hindu female *acquired after* the commencement of the Act will be held by her as a full owner thereof and not as a limited owner. She has become a fresh stock of descent in respect of that property.[64]

The word "possession" used in this section is to be understood in a very broad sense and as referring to "the state of owning or having in one's hand or power". It covers constructive possession or possession-in-law.[65]

Possession physical or constructive, or in a legal sense on the date of the coming into operation of the Act is not the *sine qua non* for the acquisition of full ownership in property.[66]

---

60. *Eramma* v. *Veerupana*, AIR 1966 SC 1879: (1966) 2 SCR 626; *Harak Singh* v. *Kailash Singh*, AIR 1958 Pat 581.
61. *Harish Chandra Bajpai* v. *Triloki Singh*, AIR 1957 SC 444: 1957 SCR 370: 12 ELR 461.
62. *Partap Singh* v. *Union of India*, (1985) 4 SCC 197, 200, 201.
63. See also *Bai Vajia* v. *Thakorbhai Chelabhai*, (1979) 3 SCC 300.
64. *Bhagat Ram* v. *Teja Singh*, (2002) 1 SCC 210; *Sri Sri Ishwar Gopal Govind Jew Thakur* v. *Rupa Mukherjee*, (2005) 2 HLR 28 (Cal).
65. *Gummalapura Taggina Matada Kotturuswami* v. *Satre Veerayya*, AIR 1959 SC 577: 1959 Supp (1) SCR 968.
66. *Ibid.*; *Jagannathan Pillai* v. *Kunjithapadam Pillai*, (1987) 2 SCC 572: AIR 1987 SC 1493;

All that has to be shown by her is that she had "acquired" the property and she was "possessed" of the property at the point of time where title was called into question.[67]

Thus for "possession" two things are necessary (*i*) a right to possession[68], and (*ii*) to be in possession of the property either actually or constructively.[69]

The scope of Section 14(1) and (2) and when a woman gets limited ownership and when she gets full ownership of the property is explained by the Supreme Court in *Maharaja Pillai Lakshmi Ammal* v. *Maharaja Pillai Thillanayakom Pillai*[70]. The expression "full owner" is explained in *Jagannath Pillai case*[71].

The share of a woman in joint family property,[72] succeeding to her husband's undivided interest in coparcenary property,[73] share of a widow declared by a preliminary decree in a partition suit,[74] possession of property pursuant to or in recognition of a right to maintenance,[75] purchase of property from the alienee to whom the woman had sold the property prior to the enforcement of the Act,[76] property acquired by a Hindu female at a partition or in lieu of maintenance,[77] and donation of life interest acquired by a female under a compromise decree,[78] all these types of properties ripen into an absolute property of a woman after the commencement of the Act. In *Mohinder case* (supra), before 1956, a widow gifted her limited estate. It was found to be invalid. The widow was in possession of the property as a limited owner. After the coming into force of the Act she became the full owner thereof.[79] Life estate

---

Kalawatibai v. *Soiryabai*, (1991) 3 SCC 410, 427: AIR 1991 SC 1581; *Vijay Pal Singh* v. *Dy. Director of Consolidation*, (1995) 5 SCC 212: AIR 1996 SC 146; *Mangat Mal* v. *Punni Devi*, (1995) 6 SCC 88: AIR 1996 SC 172; *Brajabandhu Misra* v. *Luhurani Misra*, AIR 1996 Ori 50.

67. *Ibid.*
68. *Mahesh Chand Sharma* v. *Raj Kumari Sharma (Smt)*, (1996) 8 SCC 128: AIR 1996 SC 869.
69. *Nazar Singh* v. *Jagjit Kaur*, (1996) 1 SCC 35: AIR 1996 SC 855; *Dindayal* v. *Rajaram* (1970) 1 SCC 786, 689; see *Kalawatibai* v. *Soiryabai*, (1991) 3 SCC 410.
70. (1988) 1 SCC 99, 102: 1988 ALR 1.
71. *Jagannathan Pillai* v. *Kunjithapadam Pillai*, (1987) 2 SCC 572.
72. *Seth Badri Prasad* v. *Kanso Devi*, (1969) 2 SCC 586: AIR 1970 SC 1963.
73. *Sukh Ram* v. *Gauri Shankar*, AIR 1968 SC 365.
74. *Munnalal* v. *Raj Kumar*, AIR 1962 SC 1493.
75. *Gulwant Kaur* v. *Mohinder Singh*, (1987) 3 SCC 674; *Rani Bai* v. *Yadunandan Ram*, (1969) 1 SCC 604; *Mangat Mal* v. *Punni Devi*, (1995) 6 SCC 88: AIR 1996 SC 172.
76. *Jagannathan Pillai* v. *Kunjithapadam Pillai*, (1987) 2 SCC 572.
77. *V. Tulasamma* v. *Sesha Reddy*, (1977) 3 SCC 99; see also *C. Masilamani Mudaliar* v. *Idol of Sri Swaminathaswami Swaminathaswami Thirukoil*, (1996) 8 SCC 525; *Laxmappa* v. *Balawa Kom Tirkappa Chavdi*, (1996) 5 SCC 458; *Nazar Singh* v. *Jagjit Kaur*, (1996) 1 SCC 35: AIR 1996 SC 855.
78. *Himi* v. *Hira Devi*, (1996) 10 SCC 642.
79. *Kalawatibai* v. *Soiryabai*, (1991) 3 SCC 410.

granted to a Hindu woman by a will also becomes her absolute estate.[80] On the death of her husband who died intestate leaving self-acquired property, the widow under the Act of 1937[81] got widow's estate in the said property under Mitakshara law. By the operation of the Act of 1956, the widow's interest gets enlarged into absolute ownership.[82]

The term ''property'' in Section 14 includes the compensation money representing the value of the property compulsorily acquired under the Land Acquisition Act.[83]

It must be noted that in *Chinti* v. *Daultu*[84], a widowed mother made a gift of property to her daughter before the commencement of this Act. By virtue of the provisions of Section 14 of the Act, the daughter who was in possession of the property at the commencement of the Act became the full owner thereof. But the anomaly is that if the property was in the hands of a male donee in similar circumstances, he would remain a limited owner unlike the female donee who becomes the absolute owner. This defeat is inherent in the section and the woman donee cannot be denied her right to become absolute owner on that ground.

If a woman acquires property before the commencement of this Act but loses its possession by transferring the same before that date, Section 14(1) will not apply.

Whether the acquisition of property before the commencement of this Act is covered by sub-section (1) or sub-section (2), depends upon the facts of each case. Consequently Section 14(1) is not meant to override the provisions of the Transfer of Property Act, 1882 and other laws recognizing transfer of limited interest in property. Sub-section (2) of Section 14 clears this position.

If a wife acquires an absolute interest in her husband's property under Section 14, her subsequent remarriage does not divest her of such property.[85]

The Supreme Court has cautioned that the right to equality is a fundamental right. And keeping this in view Parliament has enacted Section 14 to remove pre-existing disabilities fastened on the Hindu female. Section 14 is therefore to be construed harmoniously, consistent with the constitutional goal of removing gender-based discrimination and effectuating

---

80. *Thota Sesharathamma* v. *Thota Manikyamma*, (1991) 4 SCC 312; see also *Kuppuswamy* v. *Authorised Officer and Asstt. Commr. (Land Reforms)*, (1996) 5 SCC 504: AIR 1996 SC 2816.
81. Hindu Women's Right to Property Act, 1937.
82. *Brijbandhu Misra* v. *Luhurani Misra*, AIR 1996 Ori 50. See also *Lal Chand* v. *Kali Bai*, AIR 2004 P&H 173.
83. *Shakuntala Devi* v. *Beni Madhav*, AIR 1964 All 165.
84. AIR 1964 Del 264 (FB).
85. *Partap Singh* v. *Union of India*, (1985) 4 SCC 197: AIR 1985 SC 1695; *K. Naik* v. *D. Bewa*, AIR 1989 Ori 10.

economic empowerment of Hindu females.[86] Section 14(1) thus transforms a limited right into an absolute right.[87]

In *Jose* v. *Ramakrishnan Nair Radhakrishnan*[88] the court emphasized the concept of gender equality and held that the expression "female Hindu" as well as the expression "any property possessed by a female Hindu" have to be given an interpretation in consonance with the wishes and desires of the framers of the Constitution. Relying on *Vidya* v. *Nand Ram*[89] the court observed: "To read 'female Hindu' as only 'wife' is totally misconceived. Both sub-section (1) and the explanation refer significantly to the words 'female Hindu' and not 'wife'. It would not only be too limited an interpretation but an interpretation against the plain language of sub-section (1)."[90]

The decision in *Muthuswami case*[91] goes a step further and declares that a Hindu female (a widow respondent) who had come into possession of certain land (suit land) in lieu of her "pre-existing right to maintenance" out of her husband's property, is entitled to be the full owner of the property and "not a limited owner". The right of maintenance could be enforced by the respondent against her husband's estate in the hands of her father-in-law and that though she was not in actual "physical possession" of the land she was in legal possession as "she never parted with the right of her maintenance and she could enforce such right in law". The court ruled that as a full owner *she also had the power to execute an agreement for sale of such property.*

Section 14 is not violative of Article 14 or 15 of the Indian Constitution.

(d) Section 14(2)

Sub-section (2) of Section 14 saves the following and excludes them from the application of sub-section (1). Thus, property acquired by way of—

(*i*) gift,

(*ii*) will,

(*iii*) any other instrument, or

(*iv*) under a decree or order of a civil court, or

(*v*) under an award . . . which prescribes a restricted estate in such property.

---

86. *C. Masilamani Mudaliar* v. *Idol of Sri Swaminathaswami Thirukoil*, (1996) 8 SCC 525: AIR 1996 SC 1697.

87. *Beni Bai* v. *Raghubir Prasad*, (1999) 3 SCC 234: AIR 1999 SC 1147; *see* also *Naresh Kumari* v. *Shakshi Lal*, (1999) 2 SCC 656: AIR 1999 SC 928; *Balwant Kaur* v. *Chanan Singh*, (2000) 6 SCC 310: AIR 2000 SC 1908; *Palchuri Hanumayamma* v. *Tadikamalla Kotlingam*, (2001) 8 SCC 552 (all cases of enlargement of a widow's estate into absolute estate).

88. AIR 2004 Ker 16.

89. (2001) 10 SCC 747, quoted in *Jose* v. *Ramakrishnan Nair Radhakrishnan*, AIR 2004 Ker 16 at 20.

90. See also *Prakash* v. *Pushpa*, 2004 AIHC 2976 (AP).

91. *Muthuswami* v. *Augammal*, (2002) 2 SCALE 308.

This goes to reiterate that when by an instrument as above mentioned a limited or restricted estate is granted to a woman, it will remain unaffected by the provisions of Section 14(1) and will remain a limited estate. This provision is like an exception to the main principle contained in Section 14(1).[92]

However as observed by the Patna High Court,[93] much will depend on how an instrument, gift, will or award, etc. is drafted and construed. Consequently, where a will or gift does in fact convey an absolute estate to a woman, the case cannot be dragged within the compass of Section 14(2).[94]

Once the estate in the hands of a woman becomes absolute, a subsequent compromise between her and her husband's relatives will not change the position and Section 14(2) becomes inapplicable.[95]

Benefit under Section 14(1) to a woman could be given where her claim is based on her pre-existing right over her husband's property and Section 14(2) is in the nature of a proviso to Section 14(1).[96] It should be noted that the fact that a female Hindu originally had a limited right and later acquired full right does not in any way alter the rules of succession given in Section 15(2).[97]

21. GENERAL RULES OF SUCCESSION IN THE CASE OF A FEMALE HINDU [Sections 15 & 16]

(a) Scope and application (Section 15)

Section 15 lays down certain rules of succession to the property of a female Hindu. Section 16 supplements and elaborates the working of these rules. It is the first piece of legislation on the subject of succession to the property of female Hindus.

As the section says it applies when a female Hindu dies intestate leaving behind property of which she was an absolute owner. Section 15 will not apply where she leaves property over which she had only a limited right.

The section gives a list of 5 broad groups who can inherit one after another and fixes their order of priority. Section 16 goes further and fixes the order of priority within each group and their details.

The section is not retrospective.

Under this Section, the property of a female dying intestate devolves, inter alia, first upon the sons and daughters (including the children of any predeceased son or daughter) and the husband. A stepson is not a preferential heir.

---

92. *V. Tulasamma* v. *Sesha Reddy*, (1977) 3 SCC 99: AIR 1977 SC 1944.
93. *Lachhia* v. *Ramshanker*, AIR 1966 Pat 191.
94. *Tulson* v. *Sahib*, AIR 1966 Punj 262.
95. *Sri Ram* v. *Hukhmi*, AIR 1979 HP 460. See also *V. Tulsamma* v. *Shesha Reddy*, (1977) 3 SCC 99: AIR 1977 SC 1944.
96. *Muninanjappa* v. *R. Manual*, (2001) 5 SCC 363: AIR 2001 SC 1754.
97. *Bhagat Ram* v. *Teja Singh*, (2002) 1 SCC 210.

In one case[98] in Delhi High Court the second wife of a man had allowed the son and daughter-in-law of his first wife to reside in one room with kitchen and verandah of a house belonging to her out of consideration that they were children of the first wife of her husband. However after her death, the son started misbehaving with the father. Fed up, the father filed a suit for terminating the license to occupy the suit premises. The son contested this and the trial court ruled in his favour, but the appellate court reversed the trial court's order. The son appealed against the order of the appellate Court. His appeal was dismissed and the High Court held that the father of the appellant (i.e. the husband of the deceased second wife) who is alive, inherited the entire property by virtue of the provisions of the Act. He was, therefore, within his rights to terminate the appellant son's licence and upon such termination of licence the right to occupy suit premises by the son would cease.

(b) Groups of heirs [Section 15(1)]

The section lays down the following groups:

(1) (*i*) Sons and daughters;
(*ii*) children of any predeceased son or daughter;
(*iii*) husband;
(2) heirs of the husband (as determined by Sections 8 to 13 of this Act);
(3) mother and father (parents) of the deceased;
(4) heirs of the father (as determined by Sections 8 to 13 of this Act); and
(5) heirs of the mother (as determined by Sections 15 & 16 of this Act).

The five groups are mentioned in Section 16 as entries.

(c) Kinds of property of the deceased intestate female [Section 15(2)]

Section 15(2)(*a*) and (*b*) clearly classifies property into the following three groups:

(*i*) property inherited by a female Hindu from her father or mother;
(*ii*) property inherited by her from her husband or father-in-law; and
(*iii*) rest of the property.

In short property falls into 3 divisions: Property inherited from the female's parents, property inherited from her in-laws' side, i.e. her husband and her father-in-law, and, lastly, all other property.

Group (*i*) property includes property which she inherits from her parent or parents. It does not include property she received from this side, otherwise than by inheritance that is property received by sale or gift will fall into the third group. A similar proposition is quite true as regards group two property received by her from her in-laws' side. This shows that property in groups (*i*) and (*ii*) is confined to "property inherited" only.

---

98. *Bhagwandas* v. *Prabhati Ram*, AIR 2004 Del 137.

Group three property is thus quite wide which includes property inherited by a female from her deceased son or deceased grandson, from her brother and property she got as gift either from her father or mother or husband or father-in-law or any outsider. In one case a female who inherited property from her father lawfully sold it and she purchased another property out of the proceeds of its sale. This new property will fall in category (*iii*) above and not in category (*i*) or (*ii*), it was held.[1]

(d) "Son", "stepson", "sons and daughters"[2]

A "son" means a male offspring and "stepson" means a son of one's husband or wife by a former union. The word "sons" in clause (*a*) of Section 15(1) includes:

(*i*) sons born out of the womb of a female by the same husband or by different husbands including illegitimate sons too in view of Section 3(*j*) of the Act, and

(*ii*) adopted sons who are deemed to be sons for the purposes of inheritance. Children of any predeceased son or adopted son fall within the meaning of the expression "sons". In the case of a woman, a stepson, that is the son of her husband by his other wife, is a step away from the son who has come out of her own womb. But under the Act a stepson of a female dying intestate falls in the category of the heirs of the husband referred to in clause (*b*) of Section 15(1) because the family headed by a male is considered as a social unit.

The words "sons and daughters...and the husband" in clause (*a*) of sub-section 1 of Section 15 only mean "sons and daughters...and the husband of the deceased and not of anybody else''. The words "son or daughter of the deceased (including the children of any predeceased son or daughter)" in clauses (*a*) and (*b*) of sub-section (2) refer to the entire body of heirs falling under clause (*a*) of sub-section (1) except the husband. What clauses (*a*) and (*b*) of sub-section (2) do is that they make a distinction between devolution of property inherited by a female Hindu dying intestate from her father or mother on the one hand and the property inherited by her from her husband and from her father-in-law on the other.[3]

(e) Stepsons and stepdaughters

A question may arise whether the property inherited by a Hindu female intestate from her stepsons or stepdaughters falls under Section 15(1) or Section 15(2). The question was considered in *Lachhman Singh* v. *Kirpa Singh*[4] and it was held that the stepsons and/or stepdaughters will come in as heirs only under

---

1. *Emana* v. *G. Subbarao*, AIR 1976 AP 337.
2. *Lachman Singh* v. *Kirpa Singh*, (1987) 2 SCC 547.
3. *Ibid.*
4. (1987) 2 SCC 547: AIR 1987 SC 1616.

clause (*b*) of Section 15(1) or under clause (*b*) of Section 15(2). Thus they are excluded from clause (*a*) of Section 15(1). This exclusion is not unfair. Consequently, the property inherited by a female dying intestate from her stepson or stepdaughter comes under group (*iii*) above-stated.

(*f*) Exceptions to Section 15(1)

Section 15(1) lays down the order of succession to property of a female Hindu dying intestate and in doing so it enumerates five groups who inherit one after another. Section 15(2) engrafts two exceptions to Section 15(1). These exceptions state that —

(*a*) If a female Hindu dies without leaving any issue, then—

in respect of *property inherited by her from her parents*, the property shall devolve, not in accordance with the order laid down by Section 15(1) (i.e. in five categories), but it shall go *to the heirs of the father*. [Section 15(2)(*a*)]

(*b*) Similarly, if a female Hindu dies without leaving any issue, then—

in regard to *property inherited by her from her husband or father-in-law*, the property shall devolve, not in accordance with the order laid down by Section 15(1) (i.e. in five categories), but it shall go *to the heirs of the husband*.

22. ORDER OF SUCCESSION AND MANNER OF DISTRIBUTION AMONG HEIRS OF A FEMALE HINDU [SECTION 16]

(a) Three rules

This order of succession and manner of distribution is regulated by three rules stated in Section 16. These rules are as under:

Rule 1.—Among the heirs specified in the five categories in Section 15(1), those falling under one entry shall be preferred to those in any succeeding entry;

and those included in the same entry shall take simultaneously.

Rule 2.— If any son or daughter of the intestate had predeceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

Rule 3.— The devolution of property of the intestate on the heirs referred to in clauses (*b*), (*d*), and (*e*) of Section 15(1) and 15(2) shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or the husband's, as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death.

(b) Scope and application

The rules laid down by this section are supplementary to the general provisions stated in Section 15.

Rule 1 states the order of priority among the five groups of heirs mentioned in Section 15(1) and its clauses (*a*) to (*e*). Heirs belonging to the same group take simultaneously. This rule, however, does not speak about the quantum of shares to be taken by any group. For this purpose one will have to refer to Section 19.

Rule 2 states that where children and eligible grandchildren co-exist the distribution of property will be *per stirpes* and not *per capita*.

Rule 3 creates a legal fiction whereby property actually belonging to one deceased person is presumed to be that of another deceased person who died earlier.

Heir in Entry (*a*), *Section 15*(*1*): These heirs inherit the property simultaneously. (*See* Rules 1 and 2 of Section 16)

In other words son, daughter and husband each will take one share. In the branches of predeceased sons or predeceased daughters their heirs will together take the same share which the predeceased son or predeceased daughter, as the case may be, would have taken had he or she been alive.

Heirs in Entry (*b*), *Section 15*(*1*): These are the heirs of the husband. When there are no heirs in Entry (*a*) the property to be inherited will be deemed to be the property of the husband. The heirs of the husband mean heirs of a Hindu male. Consequently firstly the property goes to Class I heirs, then to Class II heirs and then to agnates and then to cognates. If there is no such heir in the line of the husband, the property will go to the heirs of Entry (*c*).

Heirs of Entry (*c*), *Section 15*(*1*): In this entry the only heirs are the mother and father of the deceased female. "Mother" includes adoptive mother but does not include a stepmother. As said before unchastity or remarriage of the mother does not disqualify her as an heir.

Father includes adoptive father.

Father and mother being simultaneous heirs they take *per capita*.

Heirs in Entry (*d*), *Section 15*(*1*): On failure of heirs in Entry (*c*) heirs in Entry (*d*) would take the property. In this entry heirs of the father would take the property and the property will be deemed to be the property of the father. Heirs of the father are the same as the heirs of a Hindu male. Property would therefore first go to Class I heirs, then to Class II heirs and then to agnates and thereafter to cognates. If there is no such heir the property will devolve on heirs of Entry (*e*).

Heirs in Entry (*e*), *Section 15*(*1*): In this entry the heirs are the heirs of the mother. And the mother being a Hindu female the property will devolve accordingly.

(c) Illustrations

(*i*) *A* dies leaving behind her husband *B*, two sons *C* and *D* and one daughter *E*. As per entry (*a*), Section 15(1) and applying Section 16 these four heirs each will take 1/4th share of the intestate's property.

(*ii*) *A* dies leaving behind her husband *B*, a son *C* and a daughter *D* and three sons of a predeceased son (*C*1) *X*, *Y* and *Z* and two daughters of a predeceased daughter (*D*1) *O* and *P*. Here the property would be divided into five parts and *B*, *C* and *D* will take 1/5th of the property and *X*, *Y* and *Z* will take 1/5th x 1/3rd = 1/15th each and *O* and *P* will take 1/5th x 1/2 = 1/10th each.

(*iii*) *A* an intestate Hindu female dies leaving behind her father's son, her predeceased son's daughter and her predeceased daughter's son.

Here the deceased father's son comes in entry four. Therefore, he is excluded and the last two heirs are preferred as they fall in entry one. Each of them takes 1/2 share of the property.

(*iv*) *A* an intestate Hindu female dies after inheriting some property of her father and leaves behind her the following relations:

(*a*) sister *S*, and

(*b*) predeceased sister's daughter, *D*.

Here *A* was holding the property of her father jointly with her sister *S*. On her death sister *S* would have *her own share* in the property, i.e. 1/2 share, plus 1/4th share as an heir of her sister *A*. Thus in total she will have 3/4th share of the property, and the predeceased sister's daughter *D* will have 1/4th share of the property, i.e. 1/2 of *A*'s share in the property, giving the other half to *S*. (See *Mahadevappa* v. *Gauramma*[5].)

(*v*) *A*, a Hindu female died intestate leaving behind —

(*a*) her husband's sister *S* and

(*b*) her own brother *B*.

Here *S* appears in entry (*b*), she is preferred to *B* who falls in entry (*d*). (See *K. Pillai* v. *Bhoopai*[6].)

(*vi*) When there is a question as to who should be preferred between the daughter of a predeceased son and sister of the intestate's deceased husband the answer is that the former will be preferred.[7]

[E]

AMENDMENTS

To remove gender discriminatory provisions mentioned in the Act of 1956,

---

5. AIR 1973 Mys 142.
6. (1975) 1 MLJ 419.
7. *Mohindero* v. *Kartar Singh*, 1991 Supp (2) SCC 605: AIR 1991 SC 257; see also *State of Punjab* v. *Balwant Singh*, 1992 Supp (3) SCC 108: AIR 1991 SC 2301: (1992) 2 Punj LR 102.

the Government of India has amended the Hindu Succession (Amendment) Act as under:

(*i*) Daughters now have the same right in the joint family property as coparceners and can exercise their rights even by demanding partition.

(*ii*) Unless the partition is one which has been registered prior to 20th December, 2004, a daughter's right cannot be defeated.

(*iii*) She can make a Will for disposition of her share in the joint family property like any of her other assets.

(*iv*) Married daughters have a right in their parental property.

(*v*) If the father has died after the commencement of the Act, the legal heirs of a predeceased daughter will be entitled to a share in the coparcenary property, which the predeceased daughter would have had if she had survived.

[F]

GENERAL PROVISIONS RELATING TO SUCCESSION [Ss. 18-24]

23. TEXT: SECTIONS 18-23

18. *Full blood preferred to half blood.*— Heirs related to an intestate by full blood shall be preferred to heirs related by half blood, if the nature of relationship is the same in every other respect.

19. *Mode of succession of two or more heirs.*— If two or more heirs succeed together to the property of an intestate, they shall take the property:—

(*a*) save as otherwise expressly provided in this Act, *per capita* and not *per stirpes*; and

(*b*) as tenants-in-common and not as joint tenants.

20. *Right of child in womb.*— A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate.

21. *Presumption in cases of simultaneous deaths.*— Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other, then, for all the purposes affecting succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder.

22. *Preferential right to acquire property in certain cases.*— (1) Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in Class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in Class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

***Explanation.*— In this section, "court" means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf.**

23. [* * *][8].

24. GENERAL

Sections 18 to 23 lay down the general rules of succession.

When succession opens, a number of problems may raise their heads. These problems require to be disposed of. For this purpose every system of succession lays down some general rules with a view to providing solutions to problems. If one looks into the general headings of these sections it would be evident that these solutions of problems are based on social values which come near to moral values.

What would be these problems? They may be (1) regarding preference of heirs when they are related by blood relationship; (2) regarding the mode of succession when two or more heirs succeed together; (3) regarding the right of a child in the womb to succeed; (4) regarding who died earlier when there are simultaneous deaths of persons (heirs); (5) in respect of sale of his share of property by one of the heirs and the right of the other heir to acquire that portion of property or interests; (6) in respect of claims in regard to a dwelling-house or (7) regarding entitlement of certain widows for succession, and (8) with respect to disqualifications of heirs (Sections 25-28); or (9) about failure of heirs (Section 29). We shall discuss these one by one.

(a) Full-blood preferred to half-blood [Section 18]

The section declares that heirs who are related to an intestate by full-blood are to be preferred to those who are related by half-blood, if the nature of the relationship is the same in every other respect.[9]

When there are heirs who belong to both, full and half-blood, and a question arises whether they would inherit simultaneously or one would be preferred to the other, the answer is provided by this section that those related to the intestate by full-blood will be preferred to those related by half-blood. Thus full-blood excludes the half-blood.

(b) Mode of succession of two or more heirs [Section 19]

As the section puts it, if two or more heirs succeed together to the property of an intestate, they shall take the property —

---

8. *Omitted* by the Hindu Succession (Amendment) Act, 2005, S. 4 (w.e.f. 9-9-2005).
9. For full-blood and half-blood *see* Chap. XVI, note 3, Hindu Marriage Act, 1955, and note 7 in this book. See also *Jhughi Tekam* v. *Asstt. Commr.*, AIR 2004 MP 52.

(*a*) *per capita* and not *per stirpes* (unless otherwise expressly provided), and

(*b*) as tenants-in-common, and not as joint tenants.[10]

The section when it directs that the heirs of a Hindu dying intestate shall take his property as tenants-in-common, it is dealing with the rights of the heirs *inter se* amongst them and not with their relationship with a stranger having a superior or distinctly separate right therein. Such a distinct right is not the subject-matter of this section.[11]

(c) Right of children in womb [Section 20]

(*i*) ***General.***—On the death of an intestate, succession opens up immediately and thereupon the property in question vests immediately in the heirs. For this reason a child who is in its mother's womb at the time of the intestate's death, but who is born alive subsequently, is placed on the same footing as the other living heirs of the testator. If this was not so such a child — posthumous child — could not inherit. All the civilised countries hold this view. Section 112 of the Indian Evidence Act lays down a presumption of legitimacy in regard to such a child.

The section says that a child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the intestate's death, and the inheritance shall be deemed to vest in such a case with effect from the date of the intestate's death.

(*ii*) ***Scope and application.***—A posthumous child is one who is born to the propositus after his/her death. The section applies to both male and female children and to all those cases of succession which are governed by the Hindu Succession Act, whether the deceased was a male or a female.

The following 2 conditions should be fulfilled before the section applies:

(1) The child must be in its mother's womb, when the propositus died, and

(2) the child is born alive after the death of the propositus.

Thus under Section 20, conception is equivalent to actual birth.

Section 20 will not apply when the mother aborts or when pregnancy ends in the birth of a stillborn child. However if the child is born alive and then dies, its share is fixed in law and on its death it will pass on to its own heirs.

---

10. For Explanation of these terms see Chapter XIII, para 4, sub-paras 9 and 10. See *Kastura Sahuani* v. *Das Seth*, AIR 1979 Ori 60; *Appropriate Authority, (IT Deptt.)* v. *M. Arifulla*, (2002) 10 SCC 342.

11. *Surayya Begum* v. *Mohd. Usman*, (1991) 3 SCC 114, 117: 1991 ALR 545.

(*iii*) ***Illustration***.—*A* dies, leaving behind him his pregnant widow *W* and his son *S*. There are no other heirs and after *A*'s death *W* gives birth to a son *S*1. After a week the child dies. How will you divide the property of *A*?

On the birth of son *S*1 there are in all three heirs of *A*, namely, *W*, *S* and *S*1. All these are Class I heirs. Their shares therefore would be 1/3rd each (equal shares).

But after *S*1 dies, his share would go to his mother *W*, as she is a Class I heir. And she will exclude *S*, who is the deceased son's brother and therefore in Class II. Consequently share of *S*1 will go to his mother *W*. *W* will have 1/3rd share in her own right and the full share of the deceased son *S*1, which was 1/3rd, i.e. she will have 1/3rd + 1/3rd = 2/3rds share of *A*'s property and *S* will have 1/3rd.

If son *S*1 was a stillborn child the position would have been different and there would be only two heirs of *A* the intestate, i.e. *W* and *S* who would have shared equally, that is 1/2 of the property to each.

It should be noted that the share of a posthumous child vests in him from the moment of the intestate's death, not from the time of its birth.[12]

(d) Presumption in cases of simultaneous deaths [Section 21]

(*i*) ***Scope and application***.—When two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other, then, for all purposes affecting succession to property it shall be presumed until the contrary is proved, that the younger survived the elder.

The section lays down a rebuttable legal presumption in respect of the time of death where two persons (for example husband and wife, father and son) die due to some mishap or catastrophe (e.g. road or rail accident, air crash, ship-wreck, drowning) and it is not proved who died first.

The presumption does not work if the facts prove otherwise.[13]

The section applies to cases of simultaneous deaths as well as to deaths of two persons one after the other where it is not known or proved who died earlier. This presumption applies to both, intestate and testamentary successions.

There was no such rule under the old Hindu law. The burden of proof lay on the party who asserted the affirmative.[14]

(*ii*) ***Illustrations***.—One *M*, a Hindu mother, by her Will left all her property to her daughter *X*. They both died in a fire. There was no evidence as to who survived the other. The court, applying the rule of presumption enumerated in Section 21, held that the daughter *X* (being younger) survived the mother *M* and

12. *Anasuyabai* v. *Jagdish*, 1977 MPLJ 7.
13. *See* Section 105, Indian Succession Act, 1925.
14. *K.S. Agha Mir Ahmad Shah* v. *Mir Mudassir Shah*, (1943-44) 71 IA 171: AIR 1944 PC 100.

on the daughter *X*'s death the property which devolved upon her would go to *X*'s heirs.[15]

In *D.P. Setty case*[16] a mother and her daughter, both, were murdered in a night. Who died first was unknown. Applying Section 21, it was decided that the younger survived the elder.

(e) Preferential right to acquire property [Section 22]

(*i*) ***Analysis and scope***.—Section 22 contains four propositions:[17] (*i*) the main provision, (*ii*) a supplementary provision, (*iii*) an ancillary provision, and (*iv*) an explanatory provision. The first confers a statutory right on the co-owner [sub-section (1), Section 22], the second determines priority between competing interests of the claimants, the third relating to enforcement of the said primary right and the fourth deals with the form.

The most powerful and potential criticism against the Hindu Succession Act is that it has introduced too many simultaneous heirs in Class I and as a result thereof there is fragmentation of the estate and interference of strangers in joint family businesses. This section prescribes a remedy for this ailment and infirmity. And the prescription has been working successfully and satisfactorily, it is said.[18]

The section lays down that when immovable property of an intestate devolves upon two or more heirs of Class I and if any one of the heirs desires to dispose of his interest in the property or in the business, the other heirs have a preferential right (statutory right) to purchase such interest proposed to be transferred. Thus a co-heir cannot sell his interest without first offering to sell it to other co-heirs of Class I.

If they do not agree upon the consideration to be paid for this preferential sale, the court will determine it. The intending purchaser may buy it or may not; but in case he chooses not to buy he will be liable to all costs of or incident to the application. Sub-section (2) thus gives to the co-heir a remedy to press his statutory preferential right as given under sub-section (1).

If two or more heirs of Class I propose to acquire interest under this section, he who offers the highest consideration for the transfer shall be preferred — sub-section (3). Thus sub-section (3) determines priority between competing claimants.

In brief, one can say that the seller co-heir's right to sell his interest in immovable property is subject to the preferential right of his co-heir to purchase

---

15. *Jayantilal* v. *Chhanalal*, AIR 1968 Guj 212; see also *D. Padmaraja Setty* v. *Gyanchandrappa*, AIR 1970 Mys 87.
16. *D.Padmaraja Setty* v. *Gyanchandrappa*, AIR 1970 Mys 87: 1970 ASIL 440-443.
17. T. Mahmood: *Hindu Succession Act, 1956*, p. 435.
18. Paras Diwan: *Hindu Law*, (1995), p. 1316.

it. If any sale is made violating this provision, the sale would be voidable at the option of the other co-heirs who hold a preferential right.

(*ii*) ***Nature of right granted by the section.***—Such a right resembles in some respects a right of pre-emption but it is not a right of pre-emption. The difference is that the law of pre-emption imposes a disability upon the property owner's unfettered right to sell. Consequently, he is forced to sell it to his neighbour.

Pre-emption right runs with the land; it is not a mere personal right but it may be so occasionally.

On the other hand the preferential right is a personal right, available to co-heirs who are Class I heirs and it does not go with the land.

In old Hindu law there was no provision like this.

The section applies to the property of a deceased male as well as a deceased female. This is evident from the language of the section as used in sub-section (1). It applies to all forms of transfer.

The court exercising jurisdiction under this section will be the court within whose jurisdiction the property is situate and if the question is of a business then the court within whose jurisdiction the business is carried on.

(f) Special provision respecting dwelling-houses [Section 23] [now *omitted*]

Where a dwelling-house is included in the property of a Hindu dying intestate, and the intestate leaves behind both male and female heirs (specified in Class I of the Schedule) who occupy the dwelling-house, any such female heir cannot claim partition of the dwelling-house unless and until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein.

The section further provides that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is remarried, or has been deserted by or has separated from her husband or is a widow. The Law Commission in its 174th report has recommended the deletion of this section.[19]

Scope and application

The section applies only to a dwelling-house. The expression dwelling-house is not defined in the Act. But it does not include a tenanted house.[20]

The opening words of Section 23 "left surviving him or her" leaves no doubt that the section applies both to male and female intestates. The section does not apply to a legatee who takes property under a will.

---

19. *See* Chap. III, para 5. Now *omitted* by the Hindu Succession (Amendment) Act, 2005, S. 4 (w.e.f. 9-9-2005).
20. *Narashimaha Murthy* v. *Susheelabai*, (1996) 3 SCC 644: AIR 1996 SC 1826.

The section is relevant only when the deceased intestate is survived by Class I heirs. In cases where the intestate is survived by Class II heirs or any other category of heirs, the section would not apply.

The section makes a special provision in regard to a dwelling-house but in doing so it denies to the female heirs of Class I their right to demand partition of their shares unless the male heirs so decide.

Under Section 23 of the Succession Act a female heir's right to seek her share in the dwelling-house is dependent upon the male heirs first dividing their own shares. This often results in complete denial of her right, a complete negation of the female's right over property in which legally she has a share.[21] Such uncertainty cannot be allowed to grow; it is more appropriate on a children's playground rather than in courts of law.[22] In *Kamal Basu case* the court further said that a look at Section 23 shows that this section carves out a very odd legal estate. Generally speaking, property with serious curtailment of right of enjoyment keeps the transfer valid but curtailment void. The modern law is not in favour of locked up property or property hedged in by complicated personal restrictions. In Section 23, a female heir gets her undivided share as much as any male heir but cannot claim partition of the family dwelling-house. This is a restriction upon her ownership of the undivided share which only Parliament can enact. By enacting this Parliament has created a special type of estate, the exact like of which was unknown to law before 1956, although women's limited enjoyment was well-known. In this case, therefore, while expressing general unhappiness with the provision, the court gave relief to the female heir by conceding her right to partition in the dwelling-house. The following remarks of the court are equally pertinent[23]:

> "If the right of the female heirs could arise and collapse, if it could wax and wane, then it would be a question of the estate itself changing from one type into another by operation of statute ... We would base our judgment on the broad reason which, simply put, indicates that if the right to partition has once arisen in favour of a female heir, in spite of the wording of Section 23, it can thereafter never collapse."

Remarriage of a widow will not deny her right where her right has already opened up on the death of her husband. Widows will have equal rights as other legal heirs on the death of her husband with respect to her individual property. But she does not have the same share in the joint family property as her son, and now her daughter.

The right of residence is assured to all the Class I heirs, except the daughters unless they are (*i*) widowed, (*ii*) deserted by their husbands, (*iii*) separated from their husbands, or (*iv*) unmarried.

---

21. *Narashimaha Murthy* v. *Susheelabai*, (1996) 3 SCC 644: AIR 1996 SC 1826; *also see* Kusum "Dwelling House & Female Heirs" (a comment on the above case).
22. *Kamal Basu Mazumdar* v. *Usha Bhadra Chowdhary*, AIR 2004 Cal 185.
23. *Ibid.* at p. 188.

The language of the proviso — "female heir is a daughter"— refers to a daughter, but since it does not say the "daughter of the deceased", the word "daughter" would include "granddaughters" who succeed as Class I heirs.

[G]

DISQUALIFICATION AND ESCHEAT

25. TEXT: SECTIONS 24-28 & 29

24. [* * *][24]

25. *Murderer disqualified.*— A person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder.

26. *Convert's descendants disqualified.*— Where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens.

27. *Succession when heir disqualified.*— If any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the intestate.

28. *Disease, defect, etc., not to disqualify.*— No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity, or save as provided in this Act, on any other ground whatsoever.

ESCHEAT

29. *Failure of heirs.*— If an intestate has left no heir qualified to succeed to his or her property in accordance with the provisions of this Act, such property shall devolve on the Government; and the Government shall take the property subject to all the obligations and liabilities to which an heir would have been subject.

26. GENERAL

The Hindu Succession Act, 1956 disqualifies the following persons as heirs of the intestate:

(1) certain widows who have remarried (S. 24)[25],

(2) one who is a murderer (S. 25),

(3) one who abets the commission of murder (S. 25), or

(4) one who has ceased to be a Hindu by conversion (S. 26).

Exception [Section 28]

However Section 28 enacts an exception to the ancient Hindu text notions and enacts that disease, defect and deformity and any other ground whatsoever will not disqualify an heir from taking the property of an intestate.

---

24. *Omitted* by the Hindu Succession (Amendment) Act, 2005, S. 5 (w.e.f. 9-9-2005).
25. S. 24 is now *omitted* as it was not necessary. *Omitted* by the Hindu Succession (Amendment) Act, 2005, S. 5 (w.e.f. 9-9-2005).

(a) Widows remarrying [Section 24]

These widows cannot inherit in their respective capacities if they remarry before the succession opens. That is to say when these widows remarry during the lifetime of the deceased, they are no longer the members of the family or they no longer remain the widow of his son, grandson and his brother. This is a rule of common sense.

One has to note that the provisions of Section 24 did not lay down a disqualification of an heir (though here it is put under the caption of disqualification of heirs). The section only gave statutory form to a situation of fact.

(b) Murderer disqualified [Section 25]

(*i*) ***Who are disqualified***.—Section 25 disqualifies the following persons:

(*i*) one who commits murder, and

(*ii*) one who abets its commission.

This disqualification emanates from a general practical policy of all systems of law, which declare that no one should be allowed to reap the fruits of his own crime.

The section therefore lays down that one who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder.[26]

For explanation of the words "murder" and "abet" one should refer to the provisions of the Indian Penal Code (Sections 300 and 107).[27]

(*ii*) ***Murder for whose property***.—Section 25 speaks of the following properties:

(*i*) The property of the person murdered; or

(*ii*) any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder.

(*iii*) ***The common law doctrine***.—The common law doctrine that a murderer cannot inherit from the person whom he has killed, was for the first time applied in India in *Kenchava* v. *Girimalappa Channappa case*[28] by the Privy Council. The doctrine was applied on the ground of justice, equity and good conscience. Excluding the murderer from inheritance the court stated that

---

26. *Kenchava Kom Sanyellappa* v. *Girimallappa Channappa Samasagar*, AIR 1924 PC 209: 51 IA 368: 82 IC 966. (A judgment of the Bombay High Court conformed by the PC at p. 210, 211 of the case.

27. *Seetharamaiah* v. *Ramakrishnaiyah*, AIR 1970 AP 407, 411 it was held that the heir need not be fully responsible for murder – some participation is sufficient.

28. (1923-24) 51 IA 368: AIR 1924 PC 209.

the "murderer should *be treated* as non-existent and not as one *who forms* the stock for a fresh line of descent".

(*iv*) ***Illustrations***[29].—On demise of *N*, his son *A* filed a suit for partition against his brother and a sister and mother who were his co-heirs. The suit *inter alia* was resisted on the ground that *A* had participated in the murder of *N*. The court acquitted *A* due to lack of evidence and benefit of doubt. He was, however, convicted under Section 324 of the Indian Penal Code. Consequently he was disqualified under Sections 25 and 27 from inheriting his father's property. The court held that Section 25 of the Hindu Succession Act does not contemplate that before a murderer is disqualified he must have been punished by a court of law for committing murder. Section 25 is based on principle of justice and public policy. On facts Justice Reddy found that the plaintiff had made "infamous contribution" to the heinous crime and so he cannot be allowed to derive advantage from his own culpable act.

One must note that under the section only the murderer is disqualified, and his descendants, if they have not in anyway participated in the crime, are not disqualified.[30]

In *Vellikannu case*[31] the question that came for consideration was about devolution of interest in coparcenary property. Here the only son being a coparcener in the joint Hindu Family governed by Mitakshara law, murdered his father, who died intestate. The son would be totally disqualified from inheriting any interest in the coparcenary property and would be deemed to have predeceased his father and his fresh stock of line of descent would cease to exist. If he is the sole male survivor in the family, he having incurred such disqualification, his wife who succeeds through him cannot also lay a claim in the property. Here the murderer is disqualified on the principle of justice, equity and good conscience as a measure of public policy.[32]

This section applies to both intestate and testamentary succession.[33]

(c) Convert's descendants disqualified [Section 26]

Where before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens.

(*i*) ***Scope and application***.—The section applies to testamentary succession.

---

29. *N. Sitaramaiah* v. *Ramakrishnaiah*, AIR 1970 AP 407: 1970 ASIL 440-443.
30. *Talla Palli Kasi Visalakshmi* v. *Talla Palli Venkata Vijaylakshmi*, AIR 2004 AP 160 (where husband commits suicide, the bar under S. 25 does not apply to the wife).
31. *Vellikannu* v. *R. Singaperumal*, (2005) 6 SCC 622: AIR 2005 SC 2587.
32. S. 25 read with S. 27. *Kenchava* v. *Girimallappa*, AIR 1924 PC 209 *relied on*.
33. *Saravanabhava* v. *Sellammal*, (1972) 2 MLJ 49.

The section will operate where one has ceased to be a Hindu — whether before or after the commencement of this Act. One should refer to definition of a Hindu under Section 2.

"Ceasing to be a Hindu" means embracing Muslim, Christian, Parsi or Jew religion. However, when a Hindu becomes a Jain, Sikh or a Buddhist or vice versa that does not amount to ceasing to be a Hindu; he remains a Hindu in such cases.

(*ii*) ***Rights of the convert and his descendants***.—Rights of a convert are regulated by the provisions of the Caste Disabilities Removal Act, 1850. The Act deals with the rights of the descendants of such a convert.

A convert lost all rights of inheritance according to old Hindu law. But the Caste Disabilities Removal Act, 1850 removed this disqualification. As seen from the section, conversion does not disqualify an heir from inheriting an intestate's property. However the descendants of such a convert are disqualified to inherit.

In spite of this disqualification in the section if the children or descendants of such a convert are Hindus at the time when the succession opens they are not disqualified.

Children born to a convert before conversion are not disqualified; same is the case of descendants of these children.

27. STATUS OF THE DISQUALIFIED PERSON [SECTION 27]

If any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the intestate.

Sections 25 and 26 relate to a murderer heir and a convert heir. This section is a supplement to the above sections in that it explains the status of such disqualified person. Thus when a person is disqualified as an heir his status is that of a non-existent person. This exactly was expressed by the Privy Council in *Kenchava case*[34] referred to in Section 25.

However, what this section states is not true as regards widows as mentioned in Section 24, i.e. they on account of their remarriage do not become "disqualified heirs" but they become non-heirs.

As regards the property of persons suffering from statutory disability or disqualification as stated above, they shall be treated as dead and their property will go to their heirs who may inherit direct from the deceased.[35] In other words since the property of the intestate does not vest in the disqualified heir, it follows that he cannot be a medium of passing property to others, i.e. he cannot be a fresh stock of descent. No one can therefore claim property through him because he is deemed as non-existent or dead.

---

34. *Kenchava* v. *Girimallappa*, (1924) 51 IA 368: AIR 1924 PC 209.
35. *Venkatalakshmammal* v. *Balakrishnachari*, AIR 1960 Mad 270.

28. DISEASE, DEFECT, ETC. NOT TO DISQUALIFY [SECTION 28]

Section 28 is a refinement of the old Hindu notions. Under the old Hindu law some of the diseases, defects, deformities and unchastity were disqualifications for becoming an heir. Accordingly (1) congenital lunacy or idiocy, (2) adoption of a religious order (becoming Sanyasi), (3) unchastity of widows, (4) murder, (5) incurable blindness, deafness or dumbness, (6) want of any limb or organ by birth, (7) lameness, (8) complete idiocy, lunacy, (9) virulent and incurable leprosy rendering one unfit for social intercourse were the disqualifications.

The Hindu Inheritance (Removal of Disabilities) Act, 1928 by Section 2 removed some of these disqualifications,[36] but the Hindu Succession Act, 1956 in one sweep abrogates all these and other disqualifications not mentioned in the Act.

(a) Meaning of disease, defect and deformity

The Oxford dictionary defines "disease" as a morbid condition of the body, an illness or sickness. It defines "defect" as lack of something essential to completeness. And "deformity" denotes malformation of body or limb. Consequent to the provisions contained in Section 28 the following will not disqualify any person from succeeding to the intestate's property: (*i*) Blindness, (*ii*) deafness, (*iii*) dumbness, (*iv*) lameness, (*v*) leprosy, (*vi*) lunacy, (*vii*) idiocy, and (*viii*) impotency.

(b) Unchastity no disqualification

Except on grounds provided in this Act there shall be no other disqualifications. The expression "on any other ground whatsoever" used in this section is quite wide to include all physical, moral and other grounds. One must therefore note that now unchastity of a woman does not at all disqualify her from succession to property. The Andhra Pradesh High Court has rightly held in *Narsimhulu case*[37] that the language of the section is so wide as to engulf in its ambit unchastity too. Youthful urge of satisfying the biological need may lead her astray and its keenness to keep the family prestige or social cohesion may be understandable. But moral righteous indignation to unchastity and ethical foundation or sentiments of the people "would not and should not" stand in the way to the statutory construction of the wide language "on any ground whatsoever". The provision has therefore to be given effect.

The section applies both to intestate and testamentary succession.

---

36. The 1928 Act is not abrogated and is therefore still in force.
37. *Narsimhulu* v. *Manemma*, AIR 1988 AP 309; *Khagendra Nath Ghosh* v. *Karunadhar Kala*, AIR 1978 Cal 431; *Chandicharan* v. *B. Mondal*, AIR 1976 Cal 356; *Jayalakshmi* v. *Ganesh Iyer*, AIR 1972 Mad 357.

[H]

ESCHEAT

29. FAILURE OF HEIRS [SECTION 29]

(a) The section

Section 29 of the Act provides that if a Hindu dying intestate has left no heirs qualified to succeed to his or her property in accordance with the provisions of the Act, such property shall devolve on the Government, and the Government shall take the property subject to all the obligations and liabilities to which an heir would have been subject.

(b) Escheat: Meaning of

The term escheat is employed to denote lapsing of property to the Government in default of heirs on the death of an intestate. It means total absence of heirs to the intestate.[38] In present times escheat is not very common since there is at least some remote relative who may claim the property or the intestate as a precaution makes a Will of his property.

(c) Scope and application

The section, as is clear from its language, applies to the following situations:

(1) when a Hindu intestate has left no legal heir;

(2) when the intestate has left an heir who, in view of Sections 24 to 28 of the Act, is statutorily disqualified from succeeding.

However, as said above where the property is disposed of by a valid Will by the deceased the section has no application.

The principle of escheat was enforced under the old Hindu Law also, as observed by the Supreme Court in *Ramachandra case*[39]. This provision is now very rarely invoked because the Act lays down such an extensive list of heirs that there is hardly any room for its operation. Moreover operation of the section can be successfully avoided by making a will of the property.

However, escheat is considered, under the section, as a mode of devolution of property as *bona vacantia* for want of a rightful owner. When the property is escheated to Government, it will stand in the shoes of the intestate's heir with all the liabilities and obligations to which the heir would have been subject;[40] i.e. subject to trusts, mortgages, charges, maintenance of dependants.

---

38. *State of Punjab* v. *Balwant Singh*, 1992 Supp (3) SCC 108: AIR 1992 SC 2301: (1992) 2 Punj LR 102.
39. *Rama Chandra Arya* v. *Man Singh*, AIR 1968 SC 954.
40. *State of Bihar* v. *Radha Krishna Singh*, (1983) 3 SCC 118: AIR 1983 SC 684; *Kachara* v. *State of Maharashtra*, AIR 1970 Bom 209; *Girdharilal Roy* v. *Bengal Government*, (1868) 12 MIA 448.

Such an estate would devolve upon the State Government or the Union Government.

[I]

TESTAMENTARY SUCCESSION

30. TEXT: SECTION 30

30. *Testamentary succession.*— [* * *] Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus.

***Explanation.*— The interest of a male Hindu in a *Mitakshara* coparcenary property or the interest of a member of a *tarwad, tavazhi, illom, kutumba or kavaru* in the property of the *tarwad, tavazhi, illom, kutumba or kavaru* shall, notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this sub-section.**

* * *

[J]

REPEALS

31. [*Repeals*].—[Repealed by the Repealing and Amending Act, 1960 (58 of 1960), Section 2 and First Schedule.]

Power to make a Will

The heading of Chapter III as well as the section "Testamentary Succession" is rather a misnomer. The chapter simply confers and declares a testamentary power of disposal of a Hindu's undivided interest on Mitakshara coparceners and other Hindus who hold such interest in other types of joint family properties recognised by Hindu law.

Elaborate rules of testamentary succession among Hindus are found in the Indian Succession Act, 1925.

In ancient times, due to strict and solid joint family system, need to dispose of property by will did not arise. It was after the advent of the Britishers in India that power of disposal of property by will was conferred on Hindus by judicial legislation.

The following three cases evolved and developed this concept:

(*i*) *Soorajmony Dasee* v. *Dinbondhu Mulick*[41];

(*ii*) *Baboo Beer Pratap Sahee* v. *Maharaja Rajendera Pratap Sahee*[42];

(*iii*) *Tagore* v. *Tagore*[43].

---

41. (1857) 6 MIA 523.
42. (1867) 12 MIA 11.
43. (1872) 9 Beng LR 377.

And thereafter came the legislation.

Section 30 thus asserts the general rule that a Hindu is now capable of disposing of by Will any property which is within his power to bequeath, including the interest of a male Hindu under a Mitakshara coparcenary property.[44]

As observed by the High Court of Madhya Pradesh in *Jamunabai case*[45] a will can be executed in relation to joint family property. The disability of a coparcener in disposing of his undivided interest in the property by Will or other testamentary document under the old Hindu law is removed by Section 30. As per Section 4 any custom inconsistent with any provision of this enactment is abrogated. In the expression "any other law for the time being in force", the "law" will include any statutory law or textual law or customary law. It would therefore follow that, if there was any prohibition under the old Hindu law, the same stands removed after coming into force of Section 30 of the Hindu Succession Act.

However the coparcener has still no power to make a gift of his undivided coparcenary interest to another coparcener without the consent of other coparceners.[46]

31. REPEAL

Section 31 repeals the Hindu Law of Inheritance (Amendment) Act, 1929 and the Hindu Women's Right to Property Act, 1937. Now, Section 31 which repealed the above two enactments, is itself repealed being a "spent provision".

THE SCHEDULE

(*See* Section 8)
Heirs in Class I and Class II
Class I

Son; daughter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of a predeceased daughter; daughter of a predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son of a predeceased son; son of a predeceased daughter of a predeceased daughter; daughter of a predeceased daughter of a predeceased daughter; daughter of a predeceased son of a predeceased daughter, daughter of a predeceased daughter of a predeceased son[47].

---

44. *Bhagyawati Jain* v. *General Public*, AIR 1995 P&H 201; *P.P.K. Gopalan Nambiar* v. *P.P.K. Balkrishnan Nambiar*, 1995 Supp (2) SCC 664: AIR 1995 SC 1852.
45. *Jamunabai* v. *Surendra Kumar*, AIR 1995 MP 274.
46. *Thamma Venkata Subbamma* v. *Thamma Ratamma*, (1987) 3 SCC 294; *M.S.B.Y. Board* v. *Subramania*, AIR 1973 Mad 277.
47. *Added* by the Hindu Succession (Amendment) Act, 2005, S. 7 (w.e.f. 9-9-2005).

Class II

I. Father.

II. (1) Son's daughter's son, (2) son's daughter's daughter, (3) brother, (4) sister.

III. (1) Daughter's son's son, (2) daughter's son's daughter, (3) daughter's daughter's son, (4) daughter's daughter's daughter.

IV. (1) Brother's son, (2) sister's son, (3) brother's daughter, (4) sister's daughter.

V. Father's father; father's mother.

VI. Father's widow; brother's widow.

VII. Father's brother; father's sister.

VIII. Mother's father; mother's mother.

IX. Mother's brother, mother's sister.

Explanation.— In this Schedule, references to a brother or sister do not include references to a brother or sister by uterine blood.

Chapter XVIII

Adoption

SYNOPSIS

A. Adoption: Meaning, object and forms
   General
B. Hindu Adoptions and Maintenance Act, 1956
C. Definitions [Section 3]
   Custom and usage [Section 3(*a*)]
   Maintenance [Section 3(*b*)]
D. Overriding effect of the Act [Section 4]
   Act not retrospective: it is prospective
E. Changes effected by the Hindu Adoptions and Maintenance Act, 1956
   1. Overriding effect of the Act [Section 4]
   2. Capacity to take in adoption
   3. As to persons capable of giving in adoption
   4. Regarding persons who may be adopted
   5. Regarding conditions as to a valid adoption
   6. Regarding results or effects of adoption
   7. Maintenance
F. Objects of adoption
G. Text: Sections 5 to 11: (Requisites of adoption)
H. Regulation of adoptions [Section 5]
I. Characteristics of a valid adoption [Sections 6 and 11]
   Adoption "by and to": meaning
J. Capacity and the right to take in adoption [Sections 7 and 8]
   Gender Bias in adoption Law
K. Capacity of a female Hindu to take in adoption [Section 8]
L. Persons capable of giving a child in adoption [Section 9]
   Some Questions unanswered
M. Who is eligible for adoption [Sections 10 and 11]
N. Effects of adoption [Section 12]
O. Doctrine of relation back
   Exceptions to the doctrine
P. Proof of adoption
Q. Peculiar kinds of adoptions
R. Text: Sections 13 and 14
S. Text: Sections 15 to 17 and Sections 29 and 30
   Presumption in favour of ancient adoptions [Section 16]

A. ADOPTION: MEANING, OBJECT AND FORMS

General

Utmost importance is attached to a son in Hindu law. As Hindu philosophers say a man is born with three debts: (1) Debts to rishis (sages), (2) Debts to gods and (3) Debts to ancestors. These debts are discharged by giving birth to a male child who studies Vedas and offers sacrifice (यज्ञ).[1]

Great importance was given to a son as (*i*) he saved his ancestors from a hell (called पुत), (*ii*) he offered panda-dan on occasion of *Shraddha*, (*iii*) he continued his father's line or name of family.

---

1. *Amrendra Mansingh* v. *Sanatan Singh*, AIR 1933 PC 155: 60 IA 242; *Hem Singh* v. *Harnam Singh*, AIR 1954 SC 581; *Kishori Lal* v. *Chaltibai*, AIR 1959 SC 504; *Chandrasekhara Mudaliar* v. *Kulandaivelu Mudaliar*, AIR 1963 SC 185. See also Dr. B.N. Mani: *Law of Dharmasastras*, (1989), *Navrang, New Delhi*, pp. 100-115 for discussion of twelve kinds of sons.

It must be for this purpose that custom of adoption must have been devised. Daughter was not adopted. The daughter could be adopted only by way of customary law.[2]

Law of adoption is given in old Shastras.[3]

There was no legislation on this topic during the British period.

Adoption is a legally recognised mode of affiliation as the son of a person, of one, who in fact was not his son. It is the act of a person taking as his lawful child a person who is not in fact his child.[4] It is the "taking of a son" — a substitute for failure of male issue.[5] Some writers describe that adoption is the civil death of a son in the natural family and legal birth of a son in the adoptive family. Adoption is thus the transplantation of a son from the family in which he is born into another family by way of gift made by his natural parents to the adopting parents.

On adoption, ties of the son with his old family are severed and he is taken as being born in the new family, acquiring rights, duties and status in the new family.

Muslim and Parsi personal laws do not recognise (say, they are unknown to) this concept. However the ancient Greek and Roman legal systems recognised the concept of adoption.

Hindus believed that one who died without having a son would go to hell, i.e. पुत्. पुत् is a particular division of hell or the infernal or the extremely annoying regions to which childless persons are said to be condemned.[6] It was the son and only the son who could save the father from hell.[7] This belief was one of the reasons to beget a son. Another reason to have a son is that the family line is continued by the son.

The ancient Hindu law recognised twelve kinds of sons. Out of this, ten have become obsolete and only two kinds of sons are now recognised: (1) *Aurasa*, i.e. legitimate son begotten of one's own wife, and (2) *Dattaka* son, i.e. the son adopted.

These *Dattaka* sons were of five kinds but only two kinds have survived, i.e. (1) the *Dattaka*, and (2) the *Kritrima*. The first form of adoption — the *Dattaka* — is in force throughout India and the *Kritrima* form continues in

---

2. *Thiruthipalli* v. *Variangthil*, (1900) 27 IA 231: ILR (1901) 24 Mad 73: 4 Cal WN 310.
3. Referring to Shastras i.e. Smritis, Mitakshara and Dayabhaga and in Dattaka Mimansa (essay) and Dattaka Chandrika (essay).
4. *Oxford Companion to Law*, (1980), p. 33.
5. *Banwari Lal* v. *Trilok Chand*, (1980) 1 SCC 349: AIR 1980 SC 419: (1980) 1 SCR 998.
6. V.S. Apte: *Student's Sanskrit-English Dictionary*, (1965), p. 340.
7. पुन्नाम्नो नरकाद्यस्मात्त्रायते पितरं सुतः। तस्मात्पुत्र इति प्रोक्तः स्वयमेव स्वयंभुवा। नरक = hell, infernal regions; corresponding to the realm of Pluto; there are said to be 21 different parts of these regions where different kinds of tortures are inflicted upon sinners. नरक कुंड is a pit in hell where the wicked are tormented (86 such places are enumerated.) There is a river called वैतरणी which has to be crossed. *Apte's Dictionary*, p. 281.

Mithila and its surrounding districts only. However the *Dattaka* form is not invalid in *Mithila*.

The object of having a son by adoption can be said to be twofold: (1) the existence of a son secured the parent's beautitude (*Moksha* or eternal pleasure), and (2) he continues the family line.

Widows under ancient law were not allowed to adopt sons for their spiritual benefit[8] and therefore the adoption of a daughter was also not permitted.[9] However by the new Act of 1956, they can adopt. It was believed that widows adopted sons only to divert the course of succession and religious motive was absent in such adoptions. The new legislation of 1956 has come out successfully from the religious and sacramental aspects of adoption and has made the institution of adoption a secular one.

As observed by the Supreme Court in *Chandrasekhara case*[10] that it may be safely held that the validity of an adoption has to be judged by spiritual rather than temporal considerations and devolution of property is only of secondary importance.

Adoption is a pure question of fact. In case of *Bhawar Lal*[11] a suit was filed for a declaration that the appellant was the adopted son of one *D*. The said suit was decreed but said decree was set aside by the lower appellate court. It was however affirmed in second appeal by the High Court. The Supreme Court held that its interference with the finding was not called for.

B. HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

To amend and codify the Hindu law relating to adoptions and maintenance a new legislation called the Hindu Adoptions and Maintenance Act, 1956 was enacted by Parliament on December 21, 1956. The Act extends to the whole of India except the State of Jammu and Kashmir (Section 1). The Act has no retrospective effect[12] (*see* Section 30).

As to the application of the Act (Section 2) *see* under the Hindu Marriage Act, 1955.

C. DEFINITIONS [SECTION 3]

3. *Definitions*.—In this Act, unless the context otherwise requires:

(*a*) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, have obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy; and

---

8. *Arumugha* v. *Valliammal*, AIR 1969 Mad 72.
9. *Ibid.*
10. *Chandrasekhara Mudaliar* v. *Kulandaivelu Mudaliar*, AIR 1963 SC 185.
11. *Bhawar Lal* v. *State of M.P.*, (2002) 10 SCC 143.
12. *Balgonda Appanna Patil* v. *Bhimgonda Appaya Patil*, AIR 1960 Bom 7: ILR 1959 Bom 701; see also *Nenu Varahalu* v. *Nene Sithamma*, AIR 1961 AP 272.

Provided further that in the case of a rule applicable only to a family, it has not been discontinued by the family;

(*b*) "maintenance" includes:

(*i*) in all cases, provision for food, clothing, residence, education and medical attendance and treatment;

(*ii*) in the case of an unmarried daughter, also the reasonable expenses of and incident to her marriage;

(*c*) "minor" means a person who has not completed his or her age of eighteen years.

Custom and Usage [Section 3(*a*)]

See Chapter II, "Sources and Operation" *supra*.

Maintenance [Section 3(*b*)]

As expressed by the Kerala High Court in *Anil Kumar* v. *R. Nair*[13], the expression includes the basic requirements of life. This is a responsibility of parents and it cannot be avoided by one parent on the pretext that such liability is taken up by the other parent. Father and earning mother both are bound to contribute to maintenance of their children in proportion to their income. This is so because law does not enjoin that father is exclusively responsible regardless of mother being affluent.[14] Maintenance includes a wife's right to residence.[15]

A minor is a person who has not completed his or her age of eighteen years.

D. OVERRIDING EFFECT OF THE ACT [SECTION 4]

In this regard the section reads as under:

4. *Overriding effect of Act.*— Save as otherwise expressly provided in this Act:

(*a*) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(*b*) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

The wordings of this section are similar to Section 5 of the Hindu Minority and Guardianship Act, 1956. This section provides that all existing laws which are inconsistent with this Act[16], whether they are ancient texts, customs or legislative enactments, are repealed. The Act does not completely obliterate the old law. With respect to matters for which provisions are made in this Act, the prior law ceases to have any effect but in regard to matters for which no provisions are made in this Act, the old law must continue to be applicable.[17]

---

13. AIR 1985 Ker 20.
14. *Padmja Sharma* v. *Ratan Lal Sharma*, (2000) 4 SCC 266: AIR 2000 SC 1398.
15. *B.P. Achal Anand* v. *S. Appi Reddy*, (2005) 3 SCC 313.
16. *Vijayalakshmamma* v. *B.T. Shankar*, (2001) 4 SCC 558: AIR 2001 SC 1424.
17. *Dhanraj Jain* v. *Suraj Bai*, AIR 1973 Raj 7.

Act not retrospective: it is prospective

Adoptions made before the coming into force of this Act are saved from the operation of the Act under Section 30. Validity of such previous adoptions shall be determined by the law that obtained before this Act came into force.[18] The Act can be said to be retrospective in its operation to the extent that it applies to pending litigations. Where there is no provision on the matter in this Act, the old law would continue to apply.[19]

E. CHANGES EFFECTED BY THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

The changes effected by the 1956 Act may be laid down as follows. One can study these changes from the following viewpoints:

1. Overriding effect of the Act.
2. Regarding capacity to take in adoption.
3. As to persons capable of giving in adoption.
4. Regarding persons who may be adopted.
5. Regarding conditions as to a valid adoption.
6. Regarding results or effects of adoption.
7. As to maintenance

As could be seen from what follows the Act has made revolutionary changes in the structure of the law of adoption and has superseded the earlier law on the subject laying down a number of propositions in the form of a code.

1. Overriding effect of the Act [Section 4]

See note 4, *supra*.

2. Capacity to take in adoption[20]

(*i*) Under the old law *only a male* could adopt and that too, *only a son*. The adopter under the old law was not required to be major; it was sufficient if he had attained the age of discretion.

Under the Act of 1956, Sections 7 and 8 lay down that *both a male and a female Hindu* can *adopt a son or daughter*. Of course other conditions laid down in this regard must be fulfilled.

---

18. *Balgonda* v. *Bhimgonda*, AIR 1960 Bom 7.
19. *Dhanraj Jain* v. *Suraj Bai*, AIR 1973 Raj 7: 1972 Raj LW 612: 1972 WLN 623, the question was whether a stepmother can give her stepson in adoption. In this matter, it was held, there is no provision in HAMA; the old law would therefore apply.
20. P.N. Chadha: *Hindu Law*, 4th Edn., Chap. 6, pp. 162-163; S.V. Raman: *A Treatise on Hindu Law*, (1972), Chap. 10.

(*ii*) Under the old law *consent of the wife* was not required for adoption; under the new Act, it is essential.

(*iii*) Under the old law an *unmarried girl* could not adopt at all while under the new Act there is no such bar.

(*iv*) Under the old law, a *widow* could, except in some cases, adopt only with the authority of her husband; while no such authority is needed under the new Act.

(*v*) Under the old law, a *wife* could not adopt during her husband's lifetime except with his express consent. Under the new Act no such consent is required if he has completely renounced the world, or has ceased to be a Hindu or has been declared by a competent court to be of unsound mind. (Section 8)

3. As to persons capable of giving in adoption

(*i*) Under the old Hindu law, the primary right to give in adoption was that of the father, the child's mother's consent was not necessary for the exercise of such a right. Under the 1956 Act a child's mother's consent is necessary to exercise such a right by the father.

(*ii*) Under the old law, no person except the father or the mother could give in adoption, but now under the 1956 Act a minor's guardian may give the child in adoption with the court's previous permission, where both the parents of the child are dead or have become incapable of giving consent. (Section 9)

4. Regarding persons who may be adopted

(*i*) It must be noted that Section 10 of the 1956 Act has introduced radical changes in the old Hindu law as to the persons who could be adopted. Before 1956 there was a difference of opinion as to this aspect and consequently the law on this aspect was not uniform. Section 10 now lays down certain rules on the point, simplifying the matter. These rules may be abridged as follows:

(*a*) Prior to the Act of 1956 no female could be adopted. Only a male could be adopted. Now a female can be adopted.

(*b*) Formerly an orphan could not be adopted, but now he or she can be adopted and can be given in adoption by his or her guardian.

(*c*) Formerly the person adopted was necessarily to belong to the same caste as the adopter; now under the Act, the bar is removed.

(*d*) Previously the adopted boy could not have been one whose mother, the adopter, could not have married, unless custom so allowed; now the bar is removed.

(*e*) Formerly a near relative had to be adopted in preference to a stranger. The Act has removed this restriction so that even if there are near relatives a stranger may be adopted.

(*f*) Under the old law there was no bar as to the age of the boy to be adopted, i.e. there was no unanimity of opinion as to the age of the son to be adopted, but now Section 10 of the Act provides that the adopted child must be under 15 years of age, unless there exists a custom or usage applicable to such an adoption.

(*g*) Illegitimacy, physical or mental incapacity, etc. no longer disqualify a child for adoption to the parties which permit adoption of persons over 15 years of age.

(*h*) Previously a married person could be adopted, however there were differences of opinion among the various schools on this point; the 1956 Act sets at rest the differences and provides that the boy or girl to be adopted must not be a married person, unless there is a custom or usage to the contrary.

(*i*) Under the new Act *dwayamushyayana* form of adoption, i.e. simultaneous adoption of a child by two or more persons or *Kritrima* and *Illatom* forms of adoption are not permissible or not recognised. [Sections 4(*b*) and 5(2)]

(*j*) Under the new Act, the person adopted must be at least 21 years younger than the adopter if the latter be of the opposite sex, whereas under the earlier uncodified law there was no such restriction. (Section 11)

5. Regarding conditions as to a valid adoption

Before the passing of the new legislation it was not settled whether the performance of the *datta homam* ceremony (i.e. oblations of clarified butter to fire) was essential to the validity of an adoption in every case, now Section 11 clearly lays down that this is not essential, only the physical act of giving and taking is essential.

6. Regarding results or effects of adoption

(*i*) An adopted son now under Section 12 shares equally with the after-born natural son; previously he did not so share, i.e. there were exceptions to this rule under previous law.

(*ii*) A valid adoption by a widow, under the old uncodified law, divested the widow of husband's estate vested in her; but now the new legislation clearly lays down that there can be no such divesting.

(*iii*) Under the *Mitakshara* law, i.e. previously uncodified law, the question whether the adoption did or did not have the effect of divesting any property which had vested in the adopted son prior to adoption, was not settled; now the new legislation, Section 12 of the 1956 Act, lays down that any property which was vested in the adopted child before the adoption, continues to vest in him or her, as the case may be.

7. Maintenance

The following changes have been brought about by the Hindu Adoptions and Maintenance Act, 1956:

(*i*) Under the old Hindu law, if a husband having a wife married again during her lifetime she *could claim* separate residence and maintenance. Now under the new Act the mere existence of more than one wife *would entitle any one of them* to claim separate residence and maintenance. [*See* Section 18(2)(*d*), Hindu Adoptions & Maintenance Act, 1956.]

(*ii*) Under the uncodified law there was no provision for maintenance of illegitimate children. But now under the new legislation, Section 20 of the Act, such children are also entitled to claim maintenance during their minority. (Section 22)

(*iii*) Unchastity of a widow is no ground for refusing her maintenance, however, the right of maintenance would be forfeited as before, if she remarried.

(*iv*) Under the uncodified law conversion to another religion did not disentitle a person to claim maintenance; but now it is a condition precedent that the claimant should be a Hindu.

(*v*) Formerly, only a son was bound to maintain his aged or infirm parents; now a daughter is also under a similar obligation.

(*vi*) The new legislation has widened the list of persons who can claim maintenance from the property of a deceased Hindu. (*See* Sections 20 and 22.)

(*vii*) Under the former law a concubine had a right to maintenance against the estate of her paramour after the paramour's death, while under the new legislation she does not have any place among the persons entitled to maintenance.

(*viii*) Formerly, some persons could enforce the right of maintenance against a person only and irrespective of any property. Again, some could enforce it against property only and some could enforce it against both. However under the new Act the right does not depend upon whether the person under obligation is possessed of any property or not, though the right itself is liable to be affected by the extent of property possessed or received by the person under obligation to meet the claim. (Section 22)

F. OBJECTS OF ADOPTION

The objects of adoption are twofold. The first object is religious, that is it attempts to secure *spiritual benefit* to the adopter and his ancestors by having a son who would offer funeral cakes and (libations, that is) offer oblations of

water to a deity or perform any solemn rite accompanied with oblations (आहूति). In other words a son is competent to offer oblations on behalf of the adopter and his ancestors.

The second object is *secular* and that is, to secure an heir and perpetuate the adopter's name.[21]

G. TEXT: SECTIONS 5 TO 11: (REQUISITES OF ADOPTION)

5. *Adoptions to be regulated by this Chapter.*—(1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void.

(2) An adoption which is void shall neither create any rights in the adoptive family in favour of any person which he or she could not have acquired except by reason of the adoption, nor destroy the rights of any person in the family of his or her birth.

6. *Requisites of a valid adoption.*—No adoption shall be valid unless:

(*i*) the person adopting has the capacity, and also the right, to take in adoption;

(*ii*) the person giving in adoption has the capacity to do so;

(*iii*) the person adopted is capable of being taken in adoption; and

(*iv*) the adoption is made in compliance with the other conditions mentioned in this Chapter.

7. *Capacity of a male Hindu to take in adoption.*—Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption:

Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

***Explanation.*—If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso.**

8. *Capacity of a female Hindu to take in adoption.*—Any female Hindu—

(*a*) who is of sound mind,

(*b*) who is not a minor, and

(*c*) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind,

has the capacity to take a son or daughter in adoption.

9. *Persons capable of giving in adoption.*—(1) No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption.

(2) Subject to the provisions of [sub-section (3) and sub-section (4)], the father, if alive, shall alone have the right to give in adoption, but such right shall not be exercised save with the consent of the mother unless the mother has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

---

21. *Bal Gangadhar Tilak* v. *Shriniwas Pandit*, (1915) 42 IA 135, 154: 39 Bom 441, 470: 19 IC 639: AIR 1915 PC 7; *Gopal Krishna* v. *Kamta Prasad*, AIR 1972 MP 193. See also *Amarendra Mansingh* v. *Sanatan Singh*, AIR 1933 PC 155: 60 IA 242.

(3) The mother may give the child in adoption if the father is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

(4) Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself.

(5) Before granting permission to a guardian under sub-section (4), the court shall be satisfied that the adoption will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child having regard to the age and understanding of the child and that the applicant for permission has not received or agreed to receive and that no person has made or given or agreed to make or give to the applicant any payment or reward in consideration of the adoption except such as the court may sanction.

Explanation .— For the purposes of this section—

(*i*) the expression "father" and "mother" do not include an adoptive father and an adoptive mother;

(*ia*) "guardian" means a person having the care of the person of a child or of both his person and property and includes—

(*a*) a guardian appointed by the will of the child's father or mother, and

(*b*) a guardian appointed or declared by a court; and

(*ii*) "court" means the city civil court or a district court within the local limits of whose jurisdiction the child to be adopted ordinarily resides.

10. *Persons who may be adopted.*—No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely:

(*i*) he or she is a Hindu;

(*ii*) he or she has not already been adopted;

(*iii*) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;

(*iv*) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

11. *Other conditions for a valid adoption.*—In every adoption, the following conditions must be complied with:

(*i*) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(*ii*) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(*iii*) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;

(*iv*) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;

(*v*) the same child may not be adopted simultaneously by two or more persons;

(*vi*) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to

transfer the child from the family of its birth [or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up] to the family of its adoption:

Provided that the performance of *datta homam* shall not be essential to the validity of an adoption.

As seen above, the perpetuation of the adopter's name and the solemnisation of the necessary rites were the duties owed by every Hindu to his ancestors. These can be considered as the foundation stones of adoption. In the course of time the validity of adoptions came to be judged by spiritual consideration, rather than temporal ones. There were a number of restraints on adoption but the Act has made radical changes in the entire structure of the law of adoption. The Act has thus superseded the earlier law and evolved, so to say, a code for adoption. (*See* under Section 4, the changes brought about by the Act, 78 of 1956.)

H. REGULATION OF ADOPTIONS [SECTION 5]

As laid down by Section 5 all adoptions made after the commencement of this Act are to be regulated by the provisions contained in this Act.[22] Any adoption made in contravention of the said provisions shall be null and void. An adoption violating the provisions of the Act shall not create any rights in the adoptive family, nor would it destroy the rights of any person in the family of his or her birth.

I. CHARACTERISTICS OF A VALID ADOPTION [SECTIONS 6 AND 11]

Adoption "by and to": meaning

The expression envisages that there are two kinds of adoptions under the Act. This has been explained by the Supreme Court in *Sawan Ram* v. *Kalawanti*.[23] One is "adoption by a Hindu" and the other is "adoption to a Hindu".

An adoption to a Hindu covers those cases, where the child is adopted by one person while the child adopted becomes the adopted child of another person also. The Supreme Court has exemplified this. It is an adoption by a female Hindu who is married and whose husband is either dead or has completely and finally renounced the world, or has been declared by a court of competent jurisdiction to be of unsound mind. Here the actual adoption is by a female Hindu, while the adoption is not only to herself but also to her husband who is either dead, or has completely and finally renounced the world or has been declared by a court to be of unsound mind.

---

22. *Kashi Nath* v. *Jagannath*, (2003) 8 SCC 740; *Surinder Kaur* v. *Satya Devi*, (2003) 2 HLR 113 (P&H).
23. AIR 1967 SC 1761: (1967) 3 SCR 687.

Similarly adoption by a married male Hindu will be considered to be an adoption to his wife also. Adoption by an unmarried man or woman is adoption to none else than the adopter.[24]

Section 6 lays down four important characteristics of a valid adoption. They relate to the person adopting, the person giving in adoption, the person adopted and the other requirements or conditions mentioned in Section 11. The cumulative effect of these two sections may be presented as under:

(*a*) the person who is adopting should have the capacity and also the right to take in adoption [Section 6(*i*)];

(*b*) the person giving in adoption has the capacity to do so [Section 6(*ii*)];

(*c*) the person adopted should be capable of being taken in adoption [Section 6(*iii*)]; and

(*d*) the adoption should comply with the other conditions as laid down in Section 11 [Section 6(*iv*)]. These conditions are *six* in number and they are mandatory. Non-compliance with any of the conditions would make the adoption invalid.

(1) According to condition number one, if a son is being adopted the adoptive father or mother must not have a Hindu son, son's son, or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption[25] [Section 11(*i*)].

One must notice the word Hindu son. Now suppose if the adopter has only one son (and there is no son's son or son's son's son) and such a son renounces Hinduism by a formal conversion to another religion, the above condition number one would not be attracted.

(2) According to the second condition if the adoption is of a daughter, the adopter should not have a daughter or son's daughter, natural or adopted, living at the time of adoption [Section 11(*ii*)].

(3) As condition number three goes, if the person to be adopted is a female, the adopter must be at least 21 years older than her [Section 11(*iii*)].

(4) Condition four lays down that if the person to be adopted is a male the adoptive mother must be at least 21 years older than him [Section 11(*iv*)].

One must note that no similar rule or condition as condition numbers 3 and 4 ever existed under the old law. Section 11, it seems, has adopted these as a precautionary measure to avoid the misuse of law.

---

24. AIR 1967 SC 1761: (1967) 3 SCR 687.
25. *Krishna* v. *Narayana*, AIR 1990 Ori 134.

(5) Condition five says that the same child may not be adopted simultaneously by two or more persons [Section 11(*v*)].

(6) The last condition prescribed is that the child to be adopted must be actually given and taken in adoption by the parents or guardians concerned or under their authority. And in doing so their intent must be to transfer the child from the family of its birth to the family of its adoption. If the child to be adopted is an abandoned child[26] or a child whose parentage is not known, a similar intention to transfer the child from the place or family where it has been brought up to the family of its adoption must exist.

The performance of *datta homam* shall not be necessary or essential to the validity of an adoption, however, as held by the Calcutta High Court[27] and the Supreme Court[28] of India the ceremony of giving and taking in adoption is essential even among the Jains. The words in Section 11, clause (*vi*) of the Act, "with intent to transfer the child from the family of its birth to the family of its adoption", explains the Supreme Court, are merely indicative of the result of actual giving and taking by the parents and guardians concerned referred to in the earlier part of the clause. Where an adoption ceremony is gone through and the giving and taking takes place, there cannot be any other intention. This very ceremony is in itself symbolic of transplanting the adopted son from the family of its birth to the adoptive family.[29] It may be noted that the nature of ceremony may vary according to circumstances.[30]

An adoption would divert the normal and natural course of succession. The court has to be extremely alert and vigilant to guard against being ensnared by schemers who indulge in unscrupulous practices out of their lust for property.[31] The factum of adoption and its validity have to be proved by the person who seeks to displace the natural succession to property by alleging an adoption.[32]

One of the conditions for a valid adoption is that the child taken/given in adoption should not have completed the age of 15 years unless there is a custom or usage applicable to the parties which permits such an adoption.[33]

In one Rajasthan High Court case[34] a fraudulent property transaction was involved in favour of a son purported to have been "adopted". The son was,

---

26. *Sankar Kumar Das* v. *Supdt. of J.N. Memorial Hospital, Kalyani*, AIR 1996 Cal 264.
27. *Ranjit Kumar Jain* v. *Kamal Kumar Choudhary*, AIR 1982 Cal 493.
28. *Kartar Singh (Minor)* v. *Surjan Singh*, (1974) 2 SCC 559.
29. *Ibid.*, pp. 561, 562.
30. *L. Debi Prasad* v. *Tribeni Devi*, (1970) 1 SCC 677.
31. *Rahasa Pandiani* v. *Gokulananda Panda*, (1987) 2 SCC 338.
32. *L. Debi Prasad* v. *Tribeni Devi*, (1970) 1 SCC 677, 680; *Arjun Banchhor* v. *Buchi*, AIR 1995 Ori 32.
33. S. 10(*iv*), Hindu Adoption & Maintenance Act (HAMA), 1956; see XL ASIL (2004) 275.
34. *Virendra Singh* v. *Kashiram*, AIR 2004 Raj 196 (Jaipur Bench).

as per evidence, aged 22 at the time of the adoption. No factum of adoption was proved and above all, no custom allowed adoption of a child above 15. This was specifically pleaded. Consequently, the adoption was held to be invalid.

J. CAPACITY AND THE RIGHT TO TAKE IN ADOPTION [SECTIONS 7 AND 8]

By effecting a change in the old Hindu law Sections 7 and 8 specify the persons who may lawfully take a son or a daughter in adoption.

As Section 7 enumerates, any male Hindu who is (*i*) of sound mind[35], and (*ii*) is not a minor has the capacity to take a son or a daughter in adoption. However if his wife is living he must obtain her consent, unless (1) she has completely and finally renounced the world, or (2) has ceased to be a Hindu, or (3) has been declared by a court of competent jurisdiction to be of unsound mind. (4) In case there are more than one wives living at the time of adoption, the consent of all the wives must be obtained unless the consent of any of them is unnecessary for any of the reasons mentioned before. Prior to 1955 polygamy was not prohibited and therefore this provision stands but now such a situation hardly arises.

The "consent of the wife" may not be express consent, it may be an implied one, which can be found out from the facts and circumstances of the case, e.g. if the wife takes a prominent part in the adoption ceremony such an inference can be validly drawn. Where consent by wife is really given, her subsequent assertion that she did not give the consent is immaterial.[36]

The consent of the wife may be dispensed within the following three situations: (1) Renunciation of the world, (2) Conversion, and (3) mental unsoundness. That the section permits that both a son and a daughter can be taken in adoption is a radical change made by the amendment. The Shastric philosophy of adoption of a son only and no daughter was not subscribed by the Parliament.

Gender Bias in Adoption Law[37]

On reading and analysing Section 8 it is clear that a married female cannot adopt, not even with the husband's consent, unless her husband suffers from the disabilities referred to in the section. A husband, on the other hand, may adopt with the consent of the wife.[38]

---

35. *Madanlal* v. *Gopi*, (1980) 4 SCC 255: AIR 1980 SC 1754: (1981) 1 SCR 594.
36. *Soma Chatterjee* v. *Chapla Chatterjee*, (1990) 2 HLR 387 (Cal).
37. *See* 49 JILI (2007) 76 to 80: Comment on *Malti Roy Chowdhury* v. *Sudhindranath Majumdar*, AIR 2007 Cal 4.
38. Hindu Adoptions and Maintenance Act, 1956, S. 7.

Likewise in the matter of giving a child in adoption, the father has a superior right. If he is alive, he alone can give away the child, though with mother's consent. The mother may give the child in adoption only if the father is dead, or has renounced the world, or has ceased to be a Hindu or is of unsound mind.[39]

Case of *Malti Roy Chowdhury*[40] must draw our attention. Property dispute was involved in this case. The appellant *M* had applied for grant of letters of administration under Section 278 of the Indian Succession Act, 1925 in respect of estate of the deceased *T*, as the sole heiress. She claimed this right as the adopted daughter of *T*. The trial court, after considering the oral and documentary evidence, held that appellant *M*, was not the adopted daughter and so dismissed her application. Hence the appeal.

It was argued on behalf of the appellant that there was overwhelming evidence to indicate adoption, like proof of ceremony of adoption, natural parents handing over the child *M*, who was 2 years old at that time, to *T* in the presence of her (*T*'s) husband and the priest; acknowledgement and acceptance by *T* that *M* was her daughter in school records; *M* lighting the funeral pyre of *T* and later performing her *Shraddha* ceremony; *M* looking after *T*'s estate, and so on. It was also contended that *T* had adopted *M* in the presence of her husband who raised no objection and so his consent was complicit. The appellate court, however, did not accept the argument of valid adoption. It conceded that there was evidence to prove that the biological parents had handed over *M* to *T* in the presence of *T*'s husband, and the priest, and also that *M* was admitted to school by *T* and also used their surname but these facts, according to the Court were not suggestive of valid adoption. According to the Court, under the provisions of the Act, the husband alone could adopt, but in this case, "it is an admitted position that Malti was adopted by Tripti but not by Bimal Kanta Roy Chowdhury (father)".

The Court referred to Sections 7 and 8 of HAMA, which refer to the capacity of a male and the capacity of a female, respectively to adopt. And on the basis of these provisions it held that *T* could not have adopted while her husband was alive. It remarked that *the wife had no capacity to adopt even with the consent of the husband. . . . The gender discrimination in the matter of adoption* which prevailed prior to this Act (HAMA) has been eliminated by enactment giving both male and female right to adopt under Sections 7 and 8 respectively under the Act. Thus it is clear that during the subsistence of a marriage *a wife has no right to adopt, only to give consent* in adoption if taken by her husband meaning thereby that it is the husband who is to take a decision and initiative and such right of adoption of husband is inchoate until consent is given by his wife.

---

39. Hindu Adoptions and Maintenance Act, 1956, S. 9.
40. *ante*, AIR 2007 Cal 4.

Thus while conceding that a wife has no right to adopt but only to give consent, and that it is the husband who is to take decision and initiative, the Court yet states that gender discrimination in the matter of adoption which prevailed prior to the Act has been eliminated. One really wonders whether the gender discrimination has indeed been eliminated even while the bias in the statute and the Courts own remarks and judgment belie this.

Reverting to the case of Malti Roy, the Calcutta High Court ruled that the case of adoption sought to be made by the appellant was not proved as the Husband of *T*, the deceased lady, never took any initiative in this regard; he was only present when the child '*M*' (appellant) was handed over to his wife *T*, and according to the Court that does not confer validity to the adoption. *M*, the Court held could manage the property but that would be without any heritable or other interest therein. The heirs or the legal representatives of the deceased may apply for removal of *M*, the appellant if any such situation arises.

The Court said that there was oral evidence of judicial separation between *T* (deceased) and her husband. However, there was no documentary evidence in this regard. But the High Court in appeal said that the oral evidence was inadmissible.

A query that arises out of these observation is—would it make any difference in *T*'s right to adopt if there was documentarial proof and certified copy of a decree of judicial separation between her and her husband?

Under Section 8(*c*) of the HAMA any female, inter alia, whose marriage has been dissolved only has the capacity to adopt. But a decree of judicial separation does not dissolve the marriage. It only suspends the relationship without snapping the legal tie.[41] The abovestated remark of the Calcutta High Court seem to convey that had there been a documentary proof and certified copy of the decree of judicial separation, the adoption made by *T* could have been recognised as legally valid. Assuming that this is what the Court in fact implied, it is submitted that this is not a legally tenable argument.

The net result of this case is that the adoption of the appellant was held to be invalid since the deceased had adopted her (*M*) while she (the deceased) was in a married state even though the physical handing over of the child and the ceremony of adoption was performed in the presence of the husband without his raising any objection. Even acquiescence or consent of the husband to adoption made by his wife does not legally validate the adoption. This is unfair to a female who wishes to adopt, the husband holds the veto power to deny fulfilment of maternal instincts of his wife. Maternal instincts are stronger than paternal instincts; why should a wife be deprived of the right to adopt, with husband's consent at least. The husband could be unreasonable or vindictive in not taking initiative to adopt. Law should give equal rights in the matter to both

41. See for example *Tej Kour* v. *Hakim Singh*, AIR 1965 J&K 111; *Narasimha Reddy* v. *Basamma*, AIR 1976 AP 77.

spouses, and in circumstances (such as in this case) where there is evidence of acquiescence, tacit consent or ratification, the adoption should be held to be legally valid irrespective of the fact whether the child is put in the lap of the father or of the mother.[42]

K. CAPACITY OF A FEMALE HINDU TO TAKE IN ADOPTION [SECTION 8]

As observed by the Supreme Court in *Chettiar* v. *Chettiar*[43], formerly a woman could adopt only to her husband, but now she can adopt for herself. Adoption can be of boys as well as girls. A widow, therefore, can now adopt a son or a daughter for herself in her own rights. No question of divesting of any property vested in any person arises because under the Succession Act she is entitled to take the property absolutely. Under the changed circumstances, therefore, the questions of *Sapinda's* consent or depriving him of his reversionary interest or the motive of the widow for adoption do not arise.[44]

According to Section 8 the following female Hindus have the capacity to take a son or a daughter in adoption. The conditions laid down by the section are that the female must be (1) of a sound mind; (2) she must not be a minor; and (3) she must not be married. (4) If she is married; (*i*) her marriage has been dissolved, or (*ii*) her husband (*a*) is dead; or (*b*) has completely and finally renounced the world; or (*c*) ceased to be a Hindu; or (*d*) has been declared to be of unsound mind by a court of competent jurisdiction.

Ordinarily, a married woman cannot adopt. She cannot adopt even with her husband's consent except in the circumstances stated above at point (4).

The Act gives wife a right to adopt. This right is her independent personal right and she is under no legal restriction of her husband.[45]

L. PERSONS CAPABLE OF GIVING A CHILD IN ADOPTION [SECTION 9]

Section 9 gives a list of persons who are competent to give a child in adoption. The list contains only three persons, namely, *the father*, the *mother and the guardian* [Section 9(1)]. At the end of the section a clarification is given that the expressions "father" and "mother" do not include an adoptive father and

---

42. Kusum: *Gender Bias in Adoption Law: A comment on Multi Roy Chowdhury* v. *Sudhindranath Majumdar*, AIR 2007 Cal 4: 49 JILI (2007) 76-80: Vol. 49, No. 1, Jan-Mar 2007.
43. *G. Appaswami Chettiar* v. *R. Sarangapani Chettiar*, (1978) 3 SCC 55. See also *Vijayalakshmamma* v. *B.T. Shankar*, (2001) 4 SCC 558: AIR 2001 SC 1424.
44. See also *Akshay Kumar S. Labantaray* v. *Sarada Dai*, AIR 1995 Ori 212.
45. *Arumugh Udayar* v. *Valliammal*, AIR 1969 Mad 72: (1969) 2 Mad LJ 403; *Chandan Bilasini* v. *Aftabuddin Khan*, (1996) 7 SCC 13 (Can adopt without being authorised by her husband); *R. Ashok* v. *R. Bhagwathi Ammal*, (1993) 1 HLR 677 (Mad DB). (Every widow can now adopt a child by observing the conditions laid down in this Act).

an adoptive mother. "Guardian" means a person having the care of the person of a child or of both his person and property and includes —

(*a*) a guardian appointed by will of the child's father or mother; and

(*b*) a guardian appointed or declared by a court.

"Court" means the city or civil court or a district court within the local limits of whose jurisdiction the child to be adopted ordinarily resides.

Mother's consent when not necessary

As Section 9(2) clarifies, if the father is alive he alone has the right to give the child in adoption, but he must do so with the consent of the child's mother, unless (*a*) the mother has completely and finally renounced the world, or (*b*) has ceased to be a Hindu, or (*c*) has been declared to be of unsound mind by a court of competent jurisdiction.

Capacity of the mother

After the father, the next in line comes the mother. She can give the child in adoption if the husband (*a*) is dead, or (*b*) has completely and finally renounced the world, or (*c*) has ceased to be a Hindu, or (*d*) has been declared to be of unsound mind by a court of competent jurisdiction. [Section 9(3)]

Capacity of the guardian: Conditions

Lastly, comes the guardian, who can give a child in adoption with the previous permission of the court in cases where — (*a*) both, the father and mother of the child are dead; or (*b*) have completely and finally renounced the world; or (*c*) have abandoned the child; or (*d*) have been declared to be of unsound mind by a court of competent jurisdiction; or (*e*) where the parentage of the child is not known. [Section 9(4)]

Sub-section (4) further clarifies that the child can be given in adoption to any person including the guardian himself. An explanation as to the meaning of guardian is also given at the end of sub-section (5).

Duty of court

Before granting permission to a guardian under sub-section (4) the following considerations should prevail, i.e.—

(*a*) The court shall be satisfied that the adoption will be for the welfare of the child.

(*b*) Due consideration for this purpose, should be given to the wishes of the child, having regard to his age and understanding.

(*c*) The court should also make sure that the applicant has not received or agreed to receive (and that no person has made or given or agreed to make or give to the applicant) any payment or reward in consideration of adoption, except such as the court may sanction.

As observed by the Supreme Court[46] of India, reading Section 9 as a whole, especially in the context of sub-sections (2), (3) and (4), it is clear that "mother" means the natural mother and not the stepmother. Thus "father" and "mother" have clear reference to the natural father and the natural mother.

It is also understood that the person giving in adoption must be of sound mind and has attained majority.[47]

It should be noted that the above law departs from the earlier law in the following respects: (*a*) Under the old law only the father and the mother were competent to give the child in adoption; now, the guardian also can do so. (*b*) Under the old law the mother's consent was not necessary and her dissent could be ignored while giving the child in adoption. The new law has provided that, except in certain cases, her consent is essential. (*c*) Formerly, if the father prohibited giving the boy in adoption, the mother was helpless. Now she can give a child in adoption after her husband's death or in case where the husband was incompetent to do so. If the husband lays prohibition on his wife, that would be of no consequence.

Inter-country adoption

In a case involving inter-country adoption of Hindu children by Norwegian couples the Gujarat High Court has observed in *Jayantilal Shah case*[48] that the welfare of the child ranks in priority over all else, including religion of the child. A petty contention like the change of religion or culture of the child cannot stand in the way of sanctioning an inter-country adoption.

Abandoned child: adoption of

In *Sankar Kumar Das case*[49] the question of giving in adoption of an abandoned child arose. A child was abandoned in Jawaharlal Nehru Memorial Hospital, Kalyani. The whereabouts of his parents were unknown. Rival claims were made by issueless couples to adopt the child. The provisions of sub-sections (1), (4) and (5) of Section 9 demonstrate that the matter relating to adoption normally has its root in an agreement between a guardian of a minor willing to give the child in adoption and the other party who is willing to take him in adoption. The application to give the child in adoption has to be filed by the guardian of the child. Since the child was abandoned the Juvenile Justice Board was, under the law, the guardian of the said child, and consequently it was the duty of the Board to look after the child's care and comfort. The court drew a distinction in this case between temporary custody and adoption as the latter is of permanent nature and thus, in the fitness of things, the welfare of the

---

46. *Dhanraj* v. *Suraj Bai*, (1975) 2 SCC 251; also see *Dhanraj Jain* v. *Suraj Bai*, AIR 1973 Raj 7.
47. *Biswas* v. *Ardhachander*, 19 IA 101: 19 Cal 452. See S. 9 of Hindu Adoptions and Maintenance Act, 1956.
48. *Jayantilal Shah* v. *Asha Shah*, AIR 1989 Guj 152.
49. *Sankar Kumar Das* v. *Supdt., J.N. Memorial Hospital, Kalyani*, AIR 1996 Cal 264.

child would be best subserved if he was adopted by a willing couple. The Supreme Court in such cases have given guidelines in various cases.[50]

Some Questions unanswered[51]

Section 9 keeps silence on the following important questions:

(1) Do the parents who have ceased to be Hindus after conversion to a non-Hindu religion, have the capacity to give in adoption?

(2) Does a stepfather or a stepmother possess the capacity to give the child in adoption?

(3) Does the mother even after her remarriage possess the capacity to give in adoption the child of her former husband?

(4) Do minor parents possess the capacity to give their child in adoption?

Regarding Question No. 1, the Bombay High Court has held in *Sham Singh* v. *Santabai*[52] that a Rajput Hindu, who has converted to Islam does not lose his right to give his son in adoption. But what about a Brahmin converted to Islam? Does he retain such right?

Section 9, *one must note that Section 9 does not say anywhere that the person giving in adoption must be a Hindu.* Father's capacity to give in adoption continues despite his conversion.

A question arose in *Dhanraj* v. *Suraj Bai*[53] whether a stepmother or stepfather is competent to give the child in adoption? The Rajasthan High Court answered the question in negative because under Section 9 by the word father and mother is meant those who are responsible for the birth of the child, and a stepmother is not included in the meaning. Consequently, the rule of the prior law that a stepmother cannot give in adoption must hold good. In an appeal in this case the Supreme Court upheld the ruling of the Rajasthan High Court.[54]

Regarding capacity of the mother to give in adoption after remarriage (on death of her husband or after divorce from him) the Shastric law is silent. The answer should be, 'no' according to Shastric law because remarriage was not known to Shastric law. But after Hindu Widows' Remarriage Act, 1856, the Bombay High Court in *Panchappa* v. *Sajanbasawa*[55] held that a widow on her remarriage could give the son of her first husband in adoption only when she had authority from that husband, otherwise not. But after this case in 1909 in

---

50. See *Lakshmi Kant Pandey* v. *Union of India*, (1984) 2 SCC 244: AIR 1984 SC 469; *Lakshmi Kant Pandey* v. *Union of India*, (1987) 1 SCC 66: 1987 SCC (Cri) 33: AIR 1987 SC 232; *Laxmi Kant Pandey* v. *Union of India*, 1985 Supp SCC 701: AIR 1986 SC 272; *Sumanlal Chhotalal Kamdar* v. *Asha Trilokbhai Shah*, (1995) 3 SCC 700: AIR 1995 SCW 2941.
51. *Modern Hindu Law*, Chap. 5, pp. 458-462
52. (1901) ILR 25 Bom 551: 3 Bom LR 89. (For full discussion, see p. 459-462).
53. AIR 1975 Raj 7: 1972 Raj LW 612: 1972 WLN 623.
54. *Dhanraj* v. *Suraj Bai*, (1975) 2 SCC 251: 1975 Supp SCR 73.
55. (1900) ILR 24 Bom 89: 1 Bom LR 543 (DB).

Putlabai v. *Mahadu*[56] the same High Court ruled that she can given that son in adoption because she does not lose her right to give in adoption by her remarriage. She can do so in her own right. But the High Courts of Bombay, Allahabad and Patna are not of one opinion.[57]

As to capacity of minor parents there is no such restriction under Section 9 for giving in adoption. There may be minor parents. After the commencement of the HAMA we find no case law on this point. There is no restriction in the Act also. Besides one has freedom to do or a right to do a thing which is not prohibited by law. Therefore a minor parent may give his child in adoption.

For solution of those problems the law requires to be amended or clarified.[58]

M. WHO IS ELIGIBLE FOR ADOPTION [SECTIONS 10 AND 11]

This is dealt with in Section 10 which says that no person shall be capable of being taken in adoption unless the following four conditions are satisfied:

(1) The adoptee must be a Hindu. The word Hindu has to be understood in its extended connotation as contained in Section 2 as including Sikhs, Jains, Buddhists and others, the caste of the child being irrelevant.

(2) The child (he or she) should not have been already adopted by someone.

(3) The adoptee is not married.[59]A married adoptee is incapable of being adopted unless there is a custom to this effect permitting such adoption.

(4) The adoptee has not completed the age of fifteen years at the time of adoption, unless there is a custom permitting such adoption.[60]

An orphan is also now eligible for adoption even apart from custom. Similarly disease, defect or deformity is also no bar to adoption. An only son may also be given in adoption and there is no bar to it.

Under the old law only a male could be adopted; moreover the adoptee was to be of the same caste as his adoptive father but these limitations have been removed by the new law. The only requirement is that both the parties should be Hindus. A second adoption of the same person is however not recognised. Controversies about the married adoptee and the age of adoptee are now set at rest recognising the force of custom. Under the old law there was a provision

---

56. (1909) 33 Bom 107.
57. *Fakirappa Virabhadrappa* v. *Sangappa Savitrewa*, AIR 1921 Bom 1: 23 Bom LR 482 (DB); *Krishni* v. *Ratna*, AIR 1964 All 17: 1963 All LJ 218; *Ram Sakhi Kuer* v. *Daroga Prasad Singh*, AIR 1981 Pat 204: 1981 BLJ 273: 1981 MLR 272.
58. *Modern Hindu Law*, p. 462.
59. *Nemichand* v. *Basantabai*, AIR 1994 Bom 235.
60. *Hansabai* v. *Jijabai Bala Powar*, AIR 1972 Bom 98; *Kondiba Rama Papal* v. *Narayan Kondiba Papal*, (1991) 2 SCC 218: AIR 1991 SC 1180.

that the adoptee could not be a boy whose mother and the adoptive father could not have legally married, e.g. daughter's son or sister's son. This Section 10 does not refer to any such disqualifications. The simple requirement of the present Act is that the child must be a Hindu. Inter-caste adoption is quite valid.[61] Child of any relation can be adopted and it includes illegitimate children also.[62]

Other conditions for a valid adoption are laid down in Section 11, which have been discussed in the beginning.

N. EFFECTS OF ADOPTION [SECTION 12]

12. *Effect of Adoption.*—An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided that—

(*a*) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(*b*) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

(*c*) the adopted child shall not divest any person of any estate which vested in him or her before the adoption.

Sections 12 to 17 speak of the direct and indirect effect of adoption.[63]

Section 12 lays down the effects of adoption. They are: (1) an adoption takes effect from the date of adoption; (2) from the date of adoption the adoptee shall be deemed to be the child of the adoptive father or mother for all purposes; (3) all the relations and ties of the adoptee with his natural family are snapped and severed and they are substituted by the corresponding ties created in the adoptive family by adoption. The section thus points to the fact that the adoption is not retrospective in its effect. Other important effects are that:

(*a*) the adoptee cannot marry any person whom he or she could not have married, if he or she had continued in the family of his or her birth;

(*b*) any property which vested in the adoptee before the adoption shall continue to vest in him or her, subject to the obligations, if any,

---

61. *Khazan Singh* v. *Union of India*, AIR 1980 Del 60.

62. S. 2, Expls. (*a*), (*b*) and (*bb*). S. 10 is however silent on the answers of the following questions: (1) whether an only son can be adopted? (In *Balusu Gurulingaswami* v. *Balusu Ramalakshmamma*, (1899) 26 IA 113: ILR 1899 22 Mad 398: 1 Bom LR 326, held that such an adoption was valid one); (2) Adoption of the eldest son: Is it valid? As the Act is silent, the old law will apply. It is valid; (3) Adoption of a deaf and dumb son: Is it valid? Yes, it is not invalid. (See HSA, S. 28).

63. *Daniraiji Vrajlalji* v. *V.M. Chandraprabha*, AIR 1971 Guj 788.

attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

(*c*) the adoptee shall not divest any person of any estate which had vested in him or her prior to adoption. (Section 12, provisos)[64]

Adoption has the effect of transferring the adopted son from his natural family into the adoptive family. Adoption confers upon the adoptee the same rights and privileges in the adopter's family as the legitimate son, except in a few cases.

An adoptee is entitled to inherit in the adoptive family just like a natural son Conversely, the adoptee's father and his relations are entitled to bequeath to the adoptee as if he were a son born in the adoptive family. The same is the case with respect to his mother's property. If a son is born in the family after adoption, he does not lower the adoptee's position in any way. He shares equally with the latter. This was not so before 1956.

In *Raushan Devi case*[65] the first appellate court which is a final court of fact, had recorded a specific finding based on evidence on record that the plaintiff had given her consent to the proposed adoption and that requirement of giving and taking for a valid adoption having been fulfilled, the adoption cannot be said to be invalid in any court. It is not disputed before us that once the adoption is held to be valid, subsequent execution of the deed of cancellation does not affect the status of the adopted son.

It must be noted that an adoption does not deprive the adoptive parents of the power to dispose of their property by Will or gift or in any manner. This however is subject to any agreement to the contrary.[66]

Similarly, registration of an adoption deed raises a strong presumption in favour of a valid adoption, though it is not an irrebutable presumption.[67]

The onus of proof of adoption lies on the claimant.[68] On account of adoption the adoptee is transplanted in the adopting family and he gets all the rights of a naturally born son. The arrangement of Sections 12, 11 and 14 of the HAMA is such that the person adopted becomes a coparcener in the adopting

---

64. Proviso (*a*) should be read in the light of the conditions laid down in S. 5(iv) of the Hindu Marriage Act. *Also see*, Explanation to Section 3 of the Hindu Marriage Act. Proviso (*c*) is connected with the doctrine of relation back.
65. *Raushan Devi* v. *Ramji Sah*, (2002) 10 SCC 205: AIR 2002 SC 2416.
66. *See* S. 13 Hindu Adoptions and Maintenance Act, 1956. *Ugre Gowda* v. *Nagegowda*, (2004) 12 SCC 48: AIR 2004 SC 3974.
67. *Senthil Kumar* v. *Dhandapani*, AIR 2004 Mad 403; *N.R. Trivedi* v. *Distt. Education Officer*, AIR 2004 Guj 53; *Amruta Vijay Vora* v. *Union of India*, AIR 2004 Guj 51; *Ranjit Singh Dhillon* v. *Punjab School Education Board*, AIR 2004 P&H 382; *Idam Swarajya Laxmi* v. *Idam Vani*, AIR 2004 AP 482 NOC. In all cases registered adoption deed was held to be valid.
68. *Pentakota Satyanarayana* v. *Pentakota Seetharatnam*, (2005) 8 SCC 67: AIR 2005 SC 4362.

family and he puts an end to all the relations and ties with his biological family.[69]

The HAMA, 1956 has considerably enlarged a female's rights in the matter of giving and taking of a child in adoption. Section 7 is an example of this. As per its provisions, a male Hindu who has a wife living "shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind."[70] Pointing out the logic behind such mandatory requirement, the court remarked:

> "Adoption is admission of a stranger by birth to privileges of a child as if born to adoptive parents. With the adoption the child acquires interest in property belonging to adoptive parents. Thus the adoption affects the rights of a Hindu wife in the property of her husband. She cannot be compelled to recognise a stranger by birth as her child and she as the mother of the said child. More so when such adoption affects her absolute right to the property of her husband. Therefore, having regard to the object to be achieved by the Act and the underlining principle of equality sought to be achieved .... any other interpretation would be contrary to the letter and spirit of the enactment."

O. DOCTRINE OF RELATION BACK

Under the principles of old Hindu law, an adopted son was considered to have been born in the adoptive family *on the date of adoption* where the adoption had taken place during the adoptive father's lifetime, and *on the date of the adoptive father's death* where the adoption had been made after his death. Under old Hindu law adoption was always to the male and therefore this corollary was necessary. This is then the doctrine of relation back. The consequences that arose from this line of proposition were that the properties of the adopter which had vested in someone else at the time of his death, could be recovered by the adoptee. Of course the properties which the intermediate owner alienated for the purposes which were binding on the estate, could not be recovered by the adoptee.

The doctrine had the effect of creating litigation, but it was necessary then. Now Section 12 of the Act has changed the position and consequently the doctrine has been abrogated and rejected. It has been rightly stated therefore that the divestiture of estate which was an offshoot of the doctrine is expressly destroyed by proviso (*c*) to Section 12.[71]

---

69. *Basavarajappa* v. *Gurubasamma*, (2005) 12 SCC 290.
70. *Siddaramappa* v. *Gourava*, AIR 2004 Kant 230. Such an adoption was invalidated: *see* XL ASIL (2004) 277.
71. *Narra Hanumantha Rao* v. *Narra Hanumayya*, (1964) 1 Andh WR 156; see also *Punithavalli Ammal* v. *Minor Ramalingam*, (1970) 1 SCC 570: AIR 1970 SC 1730.

However, in *Sawan Ram* v. *Kalawanti*[72] a widow *after* coming into force of the Hindu Adoptions and Maintenance Act, 1956 adopted a son. This adoption is not only to herself but also to her deceased husband and consequently that relates back to the death of the husband for the purposes of determining the right of the adopted son to succeed to the property of the deceased husband, whether it is vested in her or in others. This is contrary to the express language of Section 12(*c*).

In *Sitabai case*[73], a widow of a predeceased coparcener after the commencement of the HAMA, 1956, adopted a son. A sole surviving coparcener (brother of her husband) was living at that time. The adopted son became a coparcener. He was therefore entitled to succeed in the family of the adoptive father, i.e. to him and to his collateral relations.

In *Dharma Shamrao Agalawe* v. *Pandurang Miragu Agalawe*[74], applying *Sitabai case*[75] and distinguishing *Sawan Ram*[76], the Supreme Court explained that a person adopted by a widow after the coming into force of the Act can claim a share in the joint family property already devolved on the sole surviving coparcener on the death of the husband of the adopting widow. However the adopted son will have no claim in the property already alienated by the sole surviving coparcener prior to the date of adoption (*Mitakshara* law). This was so because the joint family property does not cease to be so when it passes to the hands of a sole surviving coparcener.

Explaining the effect of adoption on property rights of adoptive parent the Supreme Court in *Dina Ji* v. *Daddi*[77] observed that proviso (*c*) to Section 12 departs from the Hindu general law and makes it clear that the adopted child shall not divest any person of any estate which has vested in him or her before the adoption. In the present case the widow who was a limited owner of the property after the death of her husband and after the Hindu Succession Act came into force, has become an absolute owner and therefore the property of her husband vested in her and therefore merely by adopting a child she could not be deprived of any of her rights in the property. The adoption would come into play and the adopted child could get the rights for which he is entitled after her death as is clear from the scheme of Section 12, proviso (*c*).[78] In continuation of the above decision the decision in *Goenka case*[79] is noteworthy. It further explains that the adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer *inter vivos* or by will.

---

72. AIR 1967 SC 1761.
73. *Sitabai* v. *Ramchandra*, (1969) 2 SCC 544: AIR 1970 SC 343.
74. (1988) 2 SCC 126: AIR 1988 SC 845: 1988 MP LJ 164. *See* also *Vasant* v. *Dattu*, (1987) 1 SCC 160: AIR 1987 SC 398.
75. *Sitabai* v. *Ramchandra*, (1969) 2 SCC 544: AIR 1970 SC 343.
76. *Sawan Ram* v. *Kalawanti*, AIR 1967 SC 1761.
77. (1990) 1 SCC 1: AIR 1990 SC 1153: 1990 Mah LJ 527: 1990 MP LJ 1: 1990 ALR 205.
78. See also *Chandan Bilasini* v. *Aftabuddin Khan*, (1996) 7 SCC 13: AIR 1996 SC 591.
79. *Chiranjilal Srilal Goenka* v. *Jasjit Singh*, (2001) 1 SCC 486: AIR 2001 SC 266.

However this power to dispose of the property would be subject to any agreement between the parties.[80]

Exceptions to the doctrine

(1) In case of succession to a collateral's property the doctrine has no application.

(2) Where a person has taken property not by intestate succession, but by transfer *inter vivos* or by the will of the father or when he takes property as a preferential heir, he would not be divested of it.

P. PROOF OF ADOPTION

As decided in *L. Debi Prasad* v. *Tribeni Devi*[81], it is well settled that a person who seeks to displace the natural succession to property by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption and its validity. This burden is a heavy one and it must be strictly discharged.[82] There are no special rules for such proof. On production of a valid instrument recording the adoption the court shall presume that a valid adoption under the Act is made.[83] This presumption is however rebuttable because mere registration of adoption is not conclusive.

Where after adoption considerable time has elapsed during which the adoption stood unchallenged, the factum of adoption must be taken as proved, i.e. a presumption in favour of its validity would arise. The person challenging an adoption would then have to establish its invalidity.

Q. PECULIAR KINDS OF ADOPTIONS

We may enumerate the following kinds of adoptions which can be considered as special but they now stand abrogated by the Act:

(1) *Kritrima* adoption,
(2) *Dwyamushyayana* adoption,
(3) *Illatom* adoption, and
(4) adoption of girls
(5) Rules for inter-country adoptions and *St. Theresa's Tender Loving Care Home case*

(1) *Kritrima adoption*: This form was prevalent in the province of Mithila and among Nambudris of Kerala. One who had no son could adopt so that he would perform exequial ceremonies of the adopter and inherit his property.

---

80. *Dina Ji* v. *Daddi*, (1990) 1 SCC 1, *relied on*.
81. (1970) 1 SCC 677: AIR 1970 SC 1286: (1971) 1 SCR 101; *Nimai Charan* v. *Uttam Bawa*, (1973) 1 CWR 68.
82. *Chhotibai* v. *Ganeshlal*, AIR 1964 MP 302.
83. *See* Section 16; *Voleti Venkatarama Rao* v. *Kesapragada Bhaskara Rao*, (1969) 2 SCC 79: AIR 1969 SC 1359.

The adoptee is not severed from his natural family in such adoption and his consent is necessary because usually the adoptee is major. Such an adoptee should be of the same caste as that of an adopter. The peculiarity of this adoption form is that under it even one's own father or brother could be adopted.

(2) *Dwyamushyayana adoption*: In this form of adoption a person is given in adoption under an agreement that he should be considered to be the son of both, the adoptive father and the natural father. The word *Dwyamushyayana* means — a son of two fathers. This was prevalent among Nambudris. If there was no agreement there was a presumption that the adoption was in the *dattaka* form. The adoptee inherited from both the families.

(3) *Illatom adoption*: This was an adoption of a son-in-law. The guiding force behind it was secular, it had no religious significance. It was with a view that the adoptee would assist in agricultural operations and cultivation of land. The adoptee was to marry the adopter's daughter. If the adopter had a son, even then such an adoption could be made. Rights of an *illatom* adoptee depended purely on custom and he had no power to stop the adopter from disposing of his property in any way he liked. He could not become a coparcener with the adopter and his sons. It is peculiar that the *illatom* adoptee's children were members of his natural family and he could continue his relations with his natural family and did not lose his rights in the natural family.[84]

(4) *Adoption of girls*: This was unknown to the general Hindu law. It was prevalent among the *devdasis* or the dancing girl community by custom. The Bombay High Court regarded it as an immoral custom and such adoptions were considered as invalid in law.[85] The Madras High Court differs from the above view but qualifies its statement that such adoptions should not be made with the object of training the girls to lead an immoral life of prostitution. The adoptees inherited from their adoptive mother.

(5) Rules for inter-country adoptions and *St. Theresa's Tender Loving Care Home case*[86]:

In this case the Supreme Court of India has laid down and reiterated the following guidelines in all cases of adoption. The guidelines were set out in *Lakshmi Kant Pandey* v. *Union of India*[87]. Facts in brief are as under:

A single mother relinquished her five year old daughter by execution of a relinquishment deed in favour of St. Theresa's Tender Loving Care Home, an organisation which claimed to be working for the cause of abandoned children. The organisation claimed that a clearance had been obtained from the Voluntary

84. It is a creature of custom. *Nalluri Krishnamma* v. *Kamepalli Venkatsubbayya*, (1918-19) 46 IA 168: AIR 1919 PC 162: 21 Bom LR 906; *Papamma* v. *Madappa*, (1993) 1 HLR 305 (Kant).

85. *Hira* v. *Radha*, ILR (1913) 37 Bom 116.

86. *St. Theresa's Tender Loving Care Home* v. *State of A.P.*, (2005) 8 SCC 525.

87. (1984) 2 SCC 244.

Coordination Agency for the child to be given in adoption abroad. They claimed that this was done because an adoption in India had not materialized since the child suffered from various physical ailments. The organisation had thus thought that it was in the best interest of the child that the child be given in adoption to a couple from the USA who was willing to adopt the child.

The State of Andhra Pradesh resisted this adoption and the Director of Child Welfare Department and the Women Department said that some unscrupulous organisations in the State were indulging in child-trafficking under cover of adoption. On enquiry conducted by the Crime Branch, it was revealed that the relinquishment deed was a fake and fabricated document and that the child was not suffering from any ailment as claimed by the organisation.

Based on the above findings, the Family Court rejected the petition filed by the organisation and the proposed adoptive parents, stating that in the case of this girl efforts for in-country adoption had not been established. This view of the Family Court was affirmed by the High Court.

Dismissing the appeal, the Supreme Court held:

"In all cases of adoption the following guidelines set out in *Lakshmi Kant Pandey case*[88] must be followed:

(A) Every effort must be made to ensure that the child be rehabilitated by adoption within the country and if that is not possible, only then can inter-country adoption be acceptable.

(B) There is a great demand for adoption of children from India and consequently there is increasing danger of ill-equipped and sometimes even undesirable organisations or individuals activating themselves in the field of inter-country adoption with a view to trafficking in children. The following requirements should therefore be insisted upon so far as a foreigner wishing to take a child in adoption is concerned.

(*i*) Every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the government of the country in which the foreigner resides.

(*ii*) No application by a foreigner for taking a child in adoption should be entertained directly by any social or welfare agency in India working in the area of inter-country adoption or by any institution or centre or home to which children are committed by the juvenile court.

(*iii*) In order to eliminate any possibility of mischief and to make sure that the child has in fact been surrendered by its biological parents, it is necessary that the institution or centre for child care or social welfare agency to which the child is surrendered, should take a document duly signed by the

88. *Lakshmi Kant Pandey* v. *Union of India*, (1984) 2 SCC 244.

biological parents and attested by at least two responsible persons. Such document of surrender should not only contain the names of the biological parents and their addresses but also information in regard to the birth of the child and its background, health and development.

(*iv*) In cases of orphans and destitute or abandoned children, where parents are not known, all efforts must be made to trace the biological parents, and if it is found that they do not want to take back the child, the same procedure as outlined above must be followed.

(*v*) The biological parents should not be encouraged or induced or even permitted to take a decision with respect to giving a child in adoption within three months from the birth of the child.

The child is a precious gift and the mere fact that he or she has, for any reason been abandoned by the parents, cannot be a reason for further neglect by society".

R. TEXT : SECTIONS 13 AND 14

13. *Right of adoptive parents to dispose of their properties.*—Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer *inter vivos* or by will.

Subject to any agreement to the contrary, Section 13 does not deprive the adoptive father or the mother of the power to dispose of his or her separate or self-acquired property by transfer *inter vivos* or by will.[89] The agreement made must be for some consideration and if such an agreement is made it is binding on the adoptive father.

14. *Determination of adoptive mother in certain cases.*—(1) Where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother.

(2) Where an adoption has been made with the consent of more than one wife, the seniormost in marriage among them shall be deemed to be the adoptive mother and the others to be stepmothers.

(3) Where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be deemed to be the stepmother of the adopted child.

(4) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the stepfather of the adopted child.

A question may arise sometime as to who is the adoptive mother of an adoptee and Section 14 lays down the following rules for the same as under:

(1) Where a male Hindu, having a wife, adopts a child, such a child becomes the adoptive child of the adoptive mother. [Section 14(1)]

(2) Where there are more than one wives and the adoption is with their consent, the seniormost wife in marriage is deemed to be the adoptee's mother and the others to be stepmothers. [Section 14(2)]

---

89. *Mukund Singh* v. *Wazir Singh*, (1972) 4 SCC 178: 1971 SCD 305. See also *Ugee Gowda* v. *Nagegowda*, (2004) 12 SCC 48.

(3) Where adoption is made by a widower or a bachelor, any woman whom he subsequently marries is deemed to be the adoptee's mother. [Section 14(3)]

(4) In case where a widow adopts a child under this Act the adoptee shall be deemed to be the son of the widow as well as of her deceased husband. [Section 14(4)]

(5) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the stepfather of the adopted child. [Section 14(4)]

S. TEXT: SECTIONS 15 TO 17 AND SECTIONS 29 AND 30

15. *Valid adoption not to be cancelled.*—No adoption which has been validly made can be cancelled by the adoptive father or mother or any other person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth.

16. *Presumption as to registered documents relating to adoption.*—Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.

17. *Prohibition of certain payments.*—(1) No person shall receive or agree to receive any payment or other reward in consideration of the adoption of any person, and no person shall make or give or agree to make or give to any other person any payment or reward the receipt of which is prohibited by this section.

(2) If any person contravenes the provisions of sub-section (1), he shall be punishable with imprisonment which may extend to six months, or with fine, or with both.

(3) No prosecution under this section shall be instituted without the previous sanction of the State Government or an officer authorised by the State Government in this behalf.

29. *Repeals.*—Repealed by the Repealing and Amending Act, 1960 (58 of 1960), Section 2 and First Schedule.

30. *Savings.*—Nothing contained in this Act shall affect any adoption made before the commencement of this Act, and the validity and effect of any such adoption shall be determined as if this Act had not been passed.

Explanation.—Section 15 reiterates the principle of the old Hindu law that a valid adoption once made cannot be cancelled by the adoptive father or mother or any other person or even by the adoptee himself.[90] The adoptee cannot renounce his or her status as such and cannot return to the family of his or her birth.

---

90. *Karnal Singh* v. *Sohan Singh*, (1994) 2 HLR 610 (P&H). But if the child is too young at the time of adoption and when he comes of age feels dissatisfied with the adoption, can he not opt out of it? Under Muslim Law such an option is given when a person is married before attaining property. He can come out of that marriage on attaining property within a reasonable time (*Khyar-ul-bulugh*). The rule is now adopted by the HMA under S. 13(2)(*iv*). Such option may be given to a child in case of adoption during his minority.

Section 16 explains that a rebuttable presumption of a valid adoption would arise on production of a valid instrument of adoption. It has to be noted that the presumption so raised is rebuttable, it remains valid until it is disproved.

Presumption in favour of ancient adoptions [Section 16]

He who challenges the adoption must discharge this burden. In case of challenge to ancient adoption this burden is the heaviest, said the Privy Council.[91] To ask for proof of adoption after fifty-four years[92] is anomalous. The Supreme Court observed that recognition as an adopted son raised even a stronger presumption in favour of validity of his adoption arising from the possibility of his rights in his own family by being adopted in another family.[93] A long lapse of time after adoption, of course, raises a presumption of adoption but this can be challenged and the adoption disproved as was the case in *Sauney Majhi* v. *Duli Dei*[94]. The Rajasthan High Court has rightly observed[95] that the presumption of validity of adoption can also be raised when adoption has taken place long back and the adopted son has been recognised to be such by the family concerned. But the question or presumption has been considered in that light, as necessary evidence may not be forthcoming on account of lapse of time. But where the question of invalidity is based on admitted relationship of the adopter with the mother of the adopted son and when it can be found that the son, who has been adopted, could not have been adopted in law, then the question of raising of presumption does not arise.

The evidence advanced to prove the adoption must be beyond reproach and the claim of adoption should not be spurious. In *Rohasa Pandiani case*[96] therefore the Supreme Court through Thakker, J., rightly observed that:

> "In case of an adoption which is not supported by a registered document or any other evidence of a clinching nature if there exist suspicious circumstances, the same must be explained to the satisfaction of the conscience of the court by the party contending that there was such an adoption. Such is the position, as an adoption would divert the normal and natural course of succession. Experience of life shows that just as there have been spurious claims about execution of a will there have been spurious claims about adoption having taken place. And the court has therefore to be aware of the risk involved in upholding the claim of adoption if there are circumstances which arouse the suspicion of the court and the conscience of

---

91. *Kanchumarthi* v. *Kanchumarthi Raju*, (1927) 53 MLJ 854 (PC).
92. As was the case in *L. Debi Prasad* v. *Tribeni Devi*, (1970) 1 SCC 677: AIR 1970 SC 1286.
93. *Ibid.*
94. AIR 1985 Ori 22, see also *Sitaram Nai* v. *Puranmal Sonar*, AIR 1985 Ori 171, 173.
95. *Damodar Lal* v. *Lalli Lal*, AIR 1985 Raj 55.
96. *Rahasa Pandiani* v. *Gokulananda Panda*, (1987) 2 SCC 338: AIR 1987 SC 962.

the court is not satisfied that the evidence preferred to support such an adoption is beyond reproach."

Section 17 prohibits payment of consideration in regard to adoption. Any one giving or receiving payment or reward in this connection would be punished with imprisonment up to six months or with fine or with both. The section being crystal clear, seeks to punish trafficking in children which is an offence.

In *Jupudi V. V. Bhaskar case*[97] an ante-adoption agreement was entered into between appellant-plaintiff (a major) and the respondent-defendant, that after the former is adopted, the former would have no right or interest in and would not advance any claim in respect of certain properties. The latter would have absolute right without any limitation in them. It was held by the Supreme Court that Section 17 does not cover cases where a major person agrees not to set-up any claim to certain properties belonging to the adoptive family. The agreement entered into does not imply that (*i*) some payment's made or agreed to be made by the appellant to the respondent; or (*ii*) reward is made to the adoptive father. The appellant had no interest of any kind in the properties of the adoptive father, which he could part with for making any reward.

Section 29 relates to repeal and Section 30 relates to the "saving clause" which provides that the provisions of this Act shall not affect any adoption made before the commencement of this Act and the validity and effect of any such adoption shall be determined as if this Act had not been passed.

---

97. *Jupudi Venkata Vijaya Bhaskar* v. *Jupudi Keshava Rao*, (2003) 8 SCC 282.

Chapter XIX

Maintenance

SYNOPSIS

[A]

1. Text: Sections 18 to 28
2. Maintenance: Meaning and sources
3. Law prior to Hindu Adoptions and Maintenance Act, 1956
4. The Hindu Adoptions and Maintenance Act, 1956
5. Changes brought about by the Act of 1956
6. Applicability of the Hindu Adoptions and Maintenance Act, 1956
7. Definitions [Sections 3 & 21]
   Dependants [Section 21]
8. Kinds of liabilities for maintenance
9. Maintenance of wife [Section 18]
   Summary
10. Maintenance of widowed daughter-in-law [Section 19]
11. Maintenance of children and aged parents [Section 20]
12. Maintenance of dependants [Sections 21 & 22]
    List of Dependants [Section 22]
13. Amount of maintenance [Section 23]
    (*a*) Award of maintenance to wife, children or infirm parents [Section 23(2)].
    (*b*) Award of maintenance to a dependant [Section 23(3)]
    (*c*) The claimant should be a Hindu [Section 24]
    (*d*) Alteration in amount of maintenance [Section 25]
    (*e*) Debts to have priority [Section 26]
    (*f*) Maintenance when to be a charge [Section 27]
    (*g*) Effect of transfer of property on right to maintenance [Section 28]
    (*h*) Right of maintenance not transferable

[B]

General Laws

1. Family Courts Act, 1984
   (*a*) General
   (*b*) Concept, purpose and status
   (*c*) Constitution
   (*d*) Jurisdiction [Section 7]
   (*e*) Procedure [Sections 9 to 14]
   (*f*) Undesirability of lawyers' interference
   (*g*) Bombay High Court's view
   (*h*) Components of auxiliary service
   (*i*) Evidence and decree
   (*j*) Miscellaneous

   Other laws
2. Maintenance proceedings under the CrPC: Sections 125-128
   (*a*) Who can claim maintenance under Section 125
   (*b*) From whom maintenance can be claimed
   (*c*) Conditions for granting maintenance
   (*d*) Who has jurisdiction
   (*e*) Procedure
   (*f*) Order
3. The Special Marriage Act, 1954 and Divorce Act, 1869

[A]

1. TEXT: SECTIONS 18 TO 28

18. *Maintenance of wife.*—(1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance:

(*a*) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of wilfully neglecting her;

(*b*) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;

(*c*) if he is suffering from a virulent form of leprosy;

(*d*) if he has any other wife living;

(*e*) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;

(*f*) if he has ceased to be a Hindu by conversion to another religion;

(*g*) if there is any other cause justifying her living separately.

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

19. *Maintenance of widowed daughter-in-law.*—(1) A Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained after the death of her husband by her father-in-law:

Provided and to the extent that she is unable to maintain herself out of her own earnings or other property or, where she has no property of her own, is unable to obtain maintenance—

(*a*) from the estate of her husband or her father or, mother, or

(*b*) from her son or daughter, if any, or his or her estate.

(2) Any obligation under sub-section (1) shall not be enforceable if the father-in-law has not the means to do so from any coparcenary property in his possession out of which the daughter-in-law has not obtained any share, and any such obligation shall cease on the re-marriage of the daughter-in-law.

20. *Maintenance of children and aged parents.*—(1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.

(3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property.

Explanation: In this section "parent" includes a childless stepmother.

21. *Dependants defined.*—For the purposes of this Chapter 'dependants' mean the following relatives of the deceased:

(*i*) his or her father;

(*ii*) his or her mother;

(*iii*) his widow, so long as she does not remarry;

(*iv*) his or her son or the son of his predeceased son or the son of a predeceased son of his predeceased son, so long as he is a minor: Provided and to the extent that he is unable to obtain maintenance, in the case of a grandson from his father's or mother's estate, and in the case of a great-grandson, from the estate of his father or mother or father's father or father's mother;

(*v*) his or her unmarried daughter, or the unmarried daughter of his predeceased son or the unmarried daughter of a predeceased son of his predeceased son, so long as she remains unmarried: Provided and to the extent that she is unable to obtain maintenance, in the case of a granddaughter from her father's or mother's estate and in the case of a great-granddaughter from the estate of her father or mother or father's father or father's mother;

(*vi*) his widowed daughter: Provided and to the extent that she is unable to obtain maintenance—

(*a*) from the estate of her husband; or

(*b*) from her son or daughter if any, or his or her estate; or

(*c*) from her father-in-law or his father or the estate of either of them;

(*vii*) any widow of his son or of a son of his predeceased son, so long as she does not re-marry: Provided and to the extent that she is unable to obtain maintenance from her husband's estate, or from her son or daughter, if any, or his or her estate; or in the case of a grandson's widow, also from her father-in-law's estate;

(*viii*) his or her minor illegitimate son, so long as he remains a minor;

(*ix*) his or her illegitimate daughter, so long as she remains unmarried.

22. *Maintenance of dependants.*—(1) Subject to the provisions of sub-section (2) the heirs of a deceased Hindu are bound to maintain the dependants of the deceased out of the estate inherited by them from the deceased.

(2) Where a dependant has not obtained, by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act, the dependant shall be entitled, subject to the provisions of this Act, to maintenance from those who take the estate.

(3) The liability of each of the persons who takes the estate shall be in proportion to the value of the share or part of the estate taken by him or her.

(4) Notwithstanding anything contained in sub-section (2) or sub-section (3), no person who is himself or herself a dependant shall be liable to contribute to the maintenance of others, if he or she has obtained a share or part the value of which is, or would, if the liability to contribute were enforced, become less than what would be awarded to him or her by way of maintenance under the Act.

23. *Amount of maintenance.*—(1) It shall be in the discretion of the court to determine whether any, and if so what, maintenance shall be awarded under the provisions of this Act, and in doing so the court shall have due regard to the consideration set out in sub-section (2) or sub-section (3), as the case may be, so far as they are applicable.

(2) In determining the amount of maintenance, if any, to be awarded to a wife, children, or aged or infirm parents under this Act, regard shall be had to:

(*a*) the position and status of the parties;

(*b*) the reasonable wants of the claimant;

(*c*) if the claimant is living separately, whether the claimant is justified in doing so;

(*d*) the value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source;

(*e*) the number of persons entitled to maintenance under this Act.

(3) In determining the amount of maintenance, if any, to be awarded to a dependant under this Act, regard shall be had to:

(*a*) the net value of the estate of the deceased after providing for the payment of his debts;

(*b*) the provision, if any, made under a will of the deceased in respect of the dependant;

(*c*) the degree of relationship between the two;

(*d*) the reasonable wants of the dependant;

(*e*) the past relations between the dependant and the deceased;

(*f*) the value of the property of the dependant and any income derived from such property; or from his or her earnings or from any other source;

(g) the number of dependants entitled to maintenance under this Act.

24. ***Claimant to maintenance should be a Hindu.*****—No person shall be entitled to claim maintenance under this Chapter if he or she has ceased to be a Hindu by conversion to another religion.**

25. ***Amount of maintenance may be altered on change of circumstances.*****—The amount of maintenance, whether fixed by a decree of court or by agreement, either before or after the commencement of this Act, may be altered subsequently if there is a material change in the circumstances justifying such alteration.**

26. ***Debts to have priority.*****—Subject to the provisions contained in Section 27 debts of every description contracted or payable by the deceased shall have priority over the claims of his dependants for maintenance under this Act.**

27. ***Maintenance when to be a charge.*****—A dependant's claim for maintenance under this Act shall not be a charge on the estate of the deceased or any portion thereof, unless one has been created by the will of the deceased, by a decree of court, by agreement between the dependant and the owner of the estate or portion, or otherwise.**

28. ***Effect of transfer of property on right to maintenance.*****—Where a dependant has a right to receive maintenance out of an estate, and such estate or any part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitous: but not against the transferee for consideration and without notice of the right.**

As observed by the Supreme Court of India[1] the right of maintenance is a matter of personal obligation in law on husband. It rests on relations arising from marriage, i.e. out of status as wife or state of matrimony and not by way of contract or otherwise. Moreover this right is not dependent on or qualified by reference to possession of any property by husband.

A woman not legally married is not entitled to maintenance.[2]

Maintenance includes within its ambit a provision for, inter alia, residence. This right is, however, personal and not heritable.[3]

2. MAINTENANCE: MEANING AND SOURCES

Maintenance is a right to get necessaries which are reasonable from another. *See* Section 3(*b*), *supra.*

As observed by the Bombay High Court, maintenance includes not only food, clothes and residence but it also includes, according to the Madras High Court, the things necessary for the comfort and status in which the person entitled is reasonably expected to live.[4] The Supreme Court has also confirmed

---

1. *B.P. Achala Anand* v. *S. Appi Reddy*, (2005) 3 SCC 313: AIR 2005 SC 986; (2005) 117 DLT 354: (2005) 1 KLT 904; following *Kirtikant D. Vadodaria* v. *State of Gujarat*, (1996) 4 SCC 479: 1996 SCC (Cri) 762.
2. *Savitaben Somabhai Bhatiya* v. *State of Gujarat*, (2005) 3 SCC 636: 2005 SCC (Cri) 787: AIR 2005 SC 1809: 2005 Cri LJ 2141: (2005) 2 Guj LR 1378. See also *Yamunabai Anantrao Adhav* v. *Anantrao Shivram Adhav*, (1988) 1 SCC 530: 1988 SCC (Cri) 182: AIR 1988 SC 644; *Bakulbai* v. *Gangaram*, (1998) 1 SCALE 188; *Abbayolla M. Subba Reddy* v. *Padmanna*, AIR 1999 AP 19 (FB); *Jayalakshmi* v. *Krishna Padayachi*, AIR 2003 Mad 134; *Soloman* v. *Jaini Bai*, AIR 2004 Mad 460: XL ASIL (2004) at p. 273.
3. *Sheela Rani* v. *Jagdish Chander Sharma*, AIR 2004 Del 158.
4. *Charandas* v. *Nagubai*, AIR 1929 Bom 452; *Srinivasa* v. *Lakshmi*, AIR 1928 Mad 216.

the above view when it expressed in *Kesarkunverba Saheb case*[5] that it does not only mean food and garments. Maintenance varies according to the position and status of a person. According to English law it is money payable to a spouse or child for that person's living expenses by the other spouse or a parent under an order of a court corresponding to the U.S. alimony.

Every Hindu whether he possesses property or not is bound personally to maintain his aged parents, his virtuous wife and his children, whether legitimate or illegitimate.

In *Rama Rao* v. *Rajah of Pithapur*[6], the Privy Council has laid down the sources of maintenance saying that the obligation of one person to maintain arose in a number of ways:

(*a*) by reason solely of *relationship* between the parties concerned,

(*b*) by reason of *possession of inherited property*,

(*c*) due to *possession of Mitakshara coparcenary property*, or

(*d*) on account of *custom*.

From the above list it becomes clear that it is not the possession of property only that brings with it the liability to maintain but the liability may arise on account of custom also.

3. LAW PRIOR TO HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

See Chapter XV-1.

A Hindu had no right to dispose of his entire property by gift or by will so as to defeat his widow's right for maintenance. However, if he does so, the donee of the property would hold the property subject to this right. The right to maintenance is a personal right[7] and consequently it cannot be the subject of transfer. Similarly, a right to future maintenance also cannot be transferred. This future right is not attachable in execution of a decree. Arrears of maintenance can however be attached.[8] It is a recurring right, accruing from day to day (*de die in diem*).[9]

4. THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

This Act amends and codifies the legislation. It has an overriding effect and prevails over all other laws or usages relating to maintenance among Hindus for which provision is made under the Act. The Act came into force from 21st

---

5. *Maharani Kesarkunverba Saheb* v. *CIT*, AIR 1960 SC 1343: (1960) 39 ITR 283.
6. AIR 1918 PC 81: (1918) 4 IA 148: ILR 41 Mad 778.
7. *Sundarambai* v. *Suppiah Pillai*, AIR 1961 Mad 323.
8. S. 60(*n*), Civil Procedure Code.
9. *Narayanarao Ramchandra Pant* v. *Ramabai*, ILR 3 Bom 415.

December, 1956. The Act has 30 sections out of which Sections 1 to 17 and 30 relate to adoptions and Sections 18 to 28 relate to maintenance.[10]

Section 18 is in regard to entitlement of maintenance in the case of a wife. The section gives reason for the purpose. This section lays down a provision in respect of a widowed daughter-in-law and Section 20 in regard to maintenance of children and aged parents. Sections 21 defines dependants and Section 22 speaks about their maintenance. Section 23 is about amount of maintenance. One who claims maintenance should be a Hindu (Section 24) and the amount of maintenance is liable to be altered on change of circumstances (Section 25). Debts have got priority over maintenance claim (Section 26) and in some cases maintenance becomes a charge on the property (Section 27). The right of maintenance is attached to the estate and the transferee of that estate takes the estate subject to that charge if the transfer is gratuitous. If the transfer is for consideration and without notice of the charge, the transferee is not subject to the right of maintenance (Section 28).

5. CHANGES BROUGHT ABOUT BY THE ACT OF 1956

The following important changes have been made by the Act:

(1) Before passing of this Act, if the husband married again during the wife's lifetime, the wife could claim separate residence and maintenance, but now the mere existence of more than one wife would entitle any of them to claim separate residence and maintenance.

(2) Unchastity of a widow is not now a ground for refusal of maintenance but if the widow remarries, she would forfeit the right to maintenance as before.

(3) Before passing of this Act only a son was bound to maintain his aged or infirm parents; but now a similar obligation is imposed on a daughter.

(4) Under the old law, conversion to another religion did not disentitle a person to claim maintenance; now, it is a condition precedent that the claimant must be a Hindu.

(5) Under the Act, the list of persons entitled to maintenance, i.e. dependants, has been widened so as to include therein not only his or her son but also the son of his predeceased son (PDS) and the predeceased son's son. Similarly it includes not only his unmarried daughter but also an unmarried daughter of his predeceased son and unmarried daughter of a predeceased son's son.

It will be seen that the obligation to maintain certain close relations is now cast on both, males and females. Under the old Hindu law, a woman was under

---

0. Section 29 is regarding "repeals".

no obligation to maintain even her own children or parents. The obligation to maintain under the old law was a legal obligation towards some and a moral obligation towards others, but it would be noticed that the obligation under the new Act is always legal. Under the new law the existence of the right of maintenance is not made to depend on property, though the right itself would be affected by the extent of property possessed or received by the person under obligation to maintain (Section 22). As laid down under Section 20 of the Act an illegitimate daughter has a right to claim maintenance while she had no such right prior to the Act. A concubine had a right to maintenance against the estate of her paramour after his death, but under the new law her name is struck off the list of persons entitled to maintenance.

6. APPLICABILITY OF THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

See Section 4 *supra.*

7. DEFINITIONS [SECTIONS 3 & 21]

For definitions of "maintenance" and "minor" *see* Section 3, *supra.*

Dependants [Section 21]

Section 20 gives a list of relatives of the deceased who are considered dependants for the purposes of this Chapter. They are:

(*i*) his or her father;

(*ii*) his or her mother;

(*iii*) his widow, so long as she does not remarry;

(*iv*) his or her minor son;

(*v*) minor son of his predeceased son;

(*vi*) minor son of the predeceased son's predeceased son;

(*vii*) his or her unmarried daughter;

(*viii*) unmarried daughter of a predeceased son;

(*ix*) unmarried daughter of a predeceased son's predeceased son;

(*x*) his widowed daughter;

(*xi*) widow of a predeceased son (so long as she does not remarry);

(*xii*) widow of a predeceased son's predeceased son (so long as she does not remarry);

(*xiii*) his or her illegitimate minor son;

(*xiv*) his or her illegitimate daughter, so long as she remains unmarried.

One must note that in case of a female Hindu her widowed daughter, her son's widow, the widow of her predeceased son's son and her husband are not

her dependants. Due to the new law, now an unmarried daughter who acquires a share in her father's property cannot claim any further right against other heirs for her maintenance or for her marriage expenses.[11]

8. KINDS OF LIABILITIES FOR MAINTENANCE

The liability of a Hindu to maintain others is of two kinds:

(*a*) personal liability,[12] and

(*b*) liability dependent on possession of property.[13]

The former arises from mere relationship between the parties, while the latter arises due to possession of property. (*See* para 1 in the beginning.)

9. MAINTENANCE OF WIFE [SECTION 18]

It is the right of a wife to be maintained by her husband during her lifetime [Section 18(1)]. This right in an incident of status or state of matrimony. Consequently a Hindu husband is under a legal obligation to maintain his wife (*see* definition of the term "maintenance" in Section 3, *supra*).

Whether the husband possesses property or not is immaterial; the husband has to discharge this legal obligation.[14] This obligation of the husband is a personal one independent of the possession of property, ancestral or self-acquired by him.[15] As long as her husband is alive, the wife is not a dependant as defined under Section 21 and during that time she cannot claim to be maintained by her relatives or by the relatives of her husband, unless they have in their possession property belonging to her husband. One must note that this section does not mention or provide for interim maintenance order, but this does not mean that her claim for it is negatived.

Per Section 18(2), she is entitled to live separately from her husband without forfeiting her claim to maintenance under the following seven circumstances:

(*a*) if the husband is guilty of desertion, i.e. of abandoning her without reasonable cause and without her consent or against her wish or of wilfully neglecting her;

---

11. *Lalithamba* v. *Venkatalaxmi*, (1970) 1 Andh WR 245.
12. *H.C. Mohan* v. *Sulochana*, (2001) 1 HLR 252 (Kant) (arises from contract. It is an absolute & personal obligation); *V. Tulasamma* v. *Sesha Reddy*, (1977) 3 SCC 99: AIR 1977 SC 1944; *Kirti Kant D. Vadodaria* v. *State of Gujarat*, (1996) 4 SCC 479; *V. Muthusami* v. *Angammal*, (2002) 2 HLR 85 (SC) [It is a tangible right against property (jus ad rem) and not a right in property (jus in rem).
13. It is a charge on property — *Vaijayantabai* v. *Kesu Anant Gangarde*, (1993) 1 HLR 45 (Bom); *Madhavi Ramesh Dudani* v. *Ramesh K. Dudani*, (2006) 1 HLR 652 (Bom DB).
14. *Naranbhai* v. *Mahadeo*, (1881) 5 Bom 99, 103; *Prem Pratap Singh* v. *Jagar Pratap Kunvari*, 1944 All 118. See *Vaijayantabai* v. *K.A. Gangarde*, (1993) 1 HLR 45 (Bom).
15. *Udaynath Samal* v. *Siri Dei*, (1973) 1 CWR 448; *Jagat Krishna Das* v. *Ajit Kumar Das*, AIR 1964 Ori 75.

(*b*) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;

(*c*) if he is suffering from a virulent form of leprosy;

(*d*) if he has any other wife living;

(*e*) if he keeps a concubine in the same house in which she (i.e. his wife) is living, or habitually resides with a concubine elsewhere;

(*f*) if he has ceased to be a Hindu by conversion to another religion; or

(*g*) if there is any other cause justifying her living separately.

For explanation and discussion of the terms "desertion", "cruelty", etc. please *see* the chapter on "Marriage", *supra.*

A wife who has been deserted by her husband will have to prove [for the purpose of clause (4) above] only the factum of desertion, and not the existence of *animus deserendi.*

The meaning of the words "any other cause" mean any reason not covered by the above six [(*a*) to (*f*)] clauses. If there is a "grave and weighty reason" or a "grave and convincing reason" for residing separately, this clause will apply. The conduct of the husband may fall short of cruelty or the husband suffers from a venereal disease in a communicable form, or since the solemnization of the marriage the husband is guilty of rape, sodomy or bestiality, that would entitle a wife for separate residence and yet she may claim maintenance.

However, it should be remembered that in view of Clause (3) to Section 18, the wife's right to separate residence and maintenance is not absolute, it is qualified, i.e. she cannot claim separate residence and maintenance if—

(*a*) she is unchaste[16]; or

(*b*) if she ceases to be a Hindu by conversion to another religion.

Under the old Hindu law an unchaste Hindu wife did not completely forfeit her right to claim maintenance. Section 18(3) contemplates, it may be said, that such a wife is not entitled to separate residence and maintenance, i.e. she cannot claim it as a matter of right, but the court may take her conduct into consideration while awarding maintenance. Moreover, Section 22 includes her in the list of dependants entitled to claim maintenance and Section 23 leaves the granting of maintenance (to such a wife) to the discretion of the court.

Unkindness of the husband not amounting to cruelty, or ordinary quarrels between husband and wife would not justify the wife in leaving her husband's house.

---

16. Unchastity cannot be presumed; it has to be effectively proved — *Boramma* v. *Dharmappa*, AIR 1969 Mys 17.

The Hindu Adoptions and Maintenance Act, 1956, it must be noted, applies to pending litigation, i.e. litigations pending before the date on which it came into force.

The word "living" in clause (*d*) of Section 18 means "alive" and not "living with the husband". The only condition for a wife calling in aid the section is that there should be another living wife for maintenance who might be residing with her husband or may not be so residing, i.e. a second wife who is "alive".[17]

The right of a wife who is living separately from her husband, for no justifiable reasons, is only suspended; it is not altogether forfeited.[18]

Section 18(2)(*b*) lays down a criterion for cruelty. That criterion is a reasonable apprehension in the mind of the wife that it will be harmful or injurious to live with her husband. This meaning given to the term "cruelty" is in accord with the meaning given to it in Section 10(1)(*b*) of the Hindu Marriage Act.

Section 18(2)(*c*) speaks of a virulent form of leprosy suffered by the husband, but it has to be noted that there is no requirement of a specific period and it is under Sections 10(1)(*c*) and 13(1)(*iv*) of the Hindu Marriage Act. However the leprosy must be virulent, i.e. very active or fatal. There is also no mention of incurability[19] of the disease in the sub-section. The sub-section also does not mention about other diseases like venereal diseases or insanity as a ground for separate residence and maintenance. It may be that they might be included in sub-section 18(2), clause (*g*).

Keeping a concubine as mentioned in clause (*e*) of Section 18(2) offends against the self-respect of the wife, affording her a ground for separate residence and maintenance.

If the wife has entered into a marriage which is void even then she can claim maintenance.[20] The same position prevailed under the old law where the marriage was void on account of being within the prohibited degrees.[21] The court has discretion in such cases to award maintenance.[22]

Summary

A Hindu wife has a right to obtain maintenance from her husband for her entire life.[23] Husband's obligation to maintain is personal and absolute.[24]

---

17. *Jagamma* v. *Satyanarayan Murthi*, AIR 1968 AP 582.
18. *Ibid.*
19. For meaning of this term see *Swarajya Laxmi* v. *Padma Rao*, (1974) 1 SCC 58: AIR 1974 SC 165.
20. *Bansidhar* v. *Chabi*, AIR 1967 Pat 277.
21. *Kamini Devi* v. *Kameshwar Singh*, AIR 1946 Pat 316.
22. *See* S. 25 of Hindu Marriage Act, 1956.
23. *Chand Dhawan* v. *Jawaharlal Dhawan*, (1993) 3 SCC 406.
24. *State of M.P.* v. *Deobati*, AIR 1960 MP 245; *V. Muthusami* v. *Angammal*, (2002) 2 HLR 85 (SC).

Agreement to live separate between husband and wife cannot take this right away.[25] It is a charge on husband's property[26] and may be secured by a bank guarantee.[27] A person who married a lady fraudulently, concealing the fact of his first marriage was granted damages by Calcutta High Court.[28] Where the marriage, dissolved is the divorcee wife cannot claim maintenance under this section. She should resort to Section 25, HMA.[29] The husband is bound to pay for wife's separate residence and is also bound to maintain her.[30] The wife is entitled to maintenance under HAMA on grounds of desertion, cruelty, virulent leprosy of the husband, another wife of the husband, concubinage, apostacy of the husband and on any other just cause.[31] However, Section 18(3) lays down that under the following two conditions a Hindu wife is not entitled to separate residence and maintenance.[32]

(1) Unchastity;

(2) Apostacy.

10. MAINTENANCE OF WIDOWED DAUGHTER-IN-LAW (SECTION 19)

As observed in *Rani Bai case*[33], as a *wife* a woman is entitled to be maintained by her husband; as a *mother* she is entitled to be maintained by her son or daughter; as a *daughter* she is entitled to be maintained by her father or mother and as a *widow* she is entitled to be maintained from the estate of her husband or by her father-in-law. Section 19 speaks about the rights of a widowed daughter-in-law to maintenance. These rights are subject to the rule that she shall get maintenance if—

(*i*) she is unable to maintain herself out of her own earnings, and

(*ii*) she shall get maintenance to the extent of supplementing her own income or earnings.

A widowed daughter-in-law shall be entitled to be maintained, by her father-in-law in the following cases:

(*a*) if she is unable to maintain herself out of her own earnings or other property;

---

25. *Bouramma* v. *Siddappa Jivappa Patarad*, (2003) 1 HLR 337 (Kant).
26. *Vaijayanta Bai* v. *K.A. Gangarde*, (1993) 1 HLR 45 (Bom).
27. *Madhavi Ramesh Dudani* v. *Ramesh K. Dudani*, (2006) 1 HLR 652 (Bom DB).
28. *Ranjit Kumar Bhattacharya* v. *Sabita Bhattacharya*, (1996) 1 HLR 580 (Cal DB).
29. *Nagorao Onkar Tayade* v. *Ranjana Nagorao Tayade*, (2005) 2 HLR 280.
30. *Channekashraiah* v. *Laxmi*, (2001) 2 HLR 163 (Kant).
31. S. 18(2) HAMA; S. 151 CPC, S. 24 HMA.
32. *Sukhaminder Singh* v. *Baljeet Kaur*, (2000) 1 HLR 75 (P&H); *Jogi Nageswaramma* v. *Jogi Sina Rae*, (1991) 2 HLR 589 (AP).
33. *Rani Bai* v. *Yadunandan Ram*, (1969) 1 SCC 604: AIR 1969 SC 1118. See also *Raina* v. *Hari Mohan Budhaulia*, (2005) 2 HLR 434 (All).

(*b*) if she has no property of her own and she is unable to obtain maintenance from the estate of

(*i*) her husband, or

(*ii*) from the estate of her father, or

(*iii*) of her mother; or

(*c*) if she is unable to obtain maintenance from her son or daughter, if any, or from their estate.

One must remember that under this section the father-in-law's obligation to maintain his daughter-in-law is not primary; it is not even a secondary obligation; it a remote obligation. This obligation shall not be enforced against him if (*i*) he has not the means to do so from any coparcenary property in his possession out of which the daughter-in-law has not obtained any share; or if (*ii*) the widowed daughter-in-law remarries [Section 19(2)]. The father-in-law is not bound to maintain her from his own self-acquisitions. His obligation is of a limited nature. If he possesses any ancestral property, he has this obligation upon him if the daughter-in-law has not obtained any share therefrom.[34] If the father-in-law dies his moral obligation passes to his heirs as a legal obligation. The Allahabad High Court has, however, ruled that a father-in-law is bound to maintain his daughter-in-law and to provide her a house.[35]

Sub-section (1) retains the right of the widowed daughter-in-law to obtain maintenance from her father-in-law. This provision is effective irrespective of the fact that she became widow before or after the commencement of the Act. Father-in-law can be obliged to maintain his daughter-in-law from coparcenary property in his possession out of which the daughter-in-law did not get any share.[36]

On her remarriage a widowed daughter in law loses her right to get maintenance from her father-in-law.[37]

Interim maintenance is payable in such a case under this section, as held by the Supreme Court *Savitri* v. *Govind Singh Rawat,*[38] which was followed by the Punjab and Haryana High Court in *Charanjit Kaur case*.[39]

Like Section 18, this section also has a connection with Section 23, which lays down that it shall be within the discretion of the court as to any, and if so what, maintenance that shall be awarded under the provisions of this Act.

---

34. *Jai Kaur* v. *Pala Singh*, AIR 1961 Punj 391: ILR (1961) 2 Punj 151.
35. *Jagdish Singh* v. *Addl. District & Sessions Judge, Dehradun*, AIR 1979 All 24. See also *Ram Saran Das* v. *Jatin Kumar*, (2000) 1 HLR 696 (P&H).
36. *Animuthu* v. *Gandhiammal*, AIR 1977 Mad 372; Reported in HLR twice as 1977 HLR 623 and 1978 HLR 619; *Master Daljit Singh* v. *Dara Singh*, (2000) 2 HLR 447 (DB).
37. *Dharmarajan* v. *Narayanan*, (2001) HLR 126 (Ker).
38. (1985) 4 SCC 337; AIR 1986 SC 948.
39. *Charanjit Kaur* v. *Darshan Singh*, (2005) 2 HLR 125 (P&H) (Reported twice).

Besides this Section 22 lays down a list of dependants wherein her name exists[40] [Section 22(1)].

11. MAINTENANCE OF CHILDREN AND AGED PARENTS [SECTION 20]

As laid down by Section 20, a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children[41] and his or her aged or infirm parents [Section 20(1)].

This obligation of a Hindu arises from the very existence of the relationship and the obligation is personal as well as legal.[42] The obligation is independent of the possession of any property.[43] The obligation extends only so far as the parent is unable to maintain himself or herself out of his or her own earnings or other property[44] [Section 20(3)]. The obligation extends not only towards the real mother but also to a childless stepmother (Section 20, Explanation).

The obligation to maintain the children lies on both the parents and to both legitimate and illegitimate[45] children this right is accorded. Thus, maintenance to a child does not depend upon that child's legitimacy.[46] This right is now a statutory right which was not so before. It is not necessary that the child or parent claiming maintenance from a Hindu under this sub-section should be a Hindu. A non-Hindu parent or a non-Hindu son is entitled to claim maintenance.[47]

Under the Act, the obligation is given a statutory form and moreover a daughter has also come under a similar obligation. Besides, the obligation is not limited and a childless stepmother gets the benefit of maintenance. Of course, the stepfather is, however, outside the orbit or the field of cognizance.

The obligation to maintain an unmarried daughter is absolute so long as she is unable to maintain herself. This liability of the father has no relation whatsoever to the age of the daughter.[48] If the father has taken a second wife and lives with her, the daughter living with her natural mother can ask for maintenance, which cannot be refused.[49] Aged and infirm parents are entitled to

---

40. See *Parul Bala* v. *Rangshidar*, AIR 1971 Cal 270.
41. *Kunjan Sashidharan* v. *Ali Radha*, (1990) 1 HLR 365 (Kant).
42. *Nanak Chand* v. *Chander Kishore*, AIR 1969 Del 235; *Kirtikant D. Vadodaria* v. *State of Gujarat*, (1996) 4 SCC 479.
43. *Waliram* v. *Mukhtiar Kaur*, 70 Punj LR 1112: AIR 1969 Punj 285.
44. *Shanta Bai* v. *Shaji*, AIR 1961 Raj 207.
45. *Kalla Maistry* v. *Kanniammal*, AIR 1963 Mys 210 (child born of adulterous intercourse).
46. *Dukhtar Jahan* v. *Mohd. Farooq*, (1987) 1 SCC 624, 631: 1987 SCC (Cri) 237: AIR 1987 SC 1049: (1987) 1 HLR 362.
47. *K.M. Adam* v. *Gopalkrishnan*, AIR 1974 Mad 232: (1974) 2 Mad LJ 110: 87 Mad LW 79. [An adopted child is included in the category of legitimate children. *Nand Krishna* v. *Bhupendra Mohan*, AIR 1966 Cal 181: 70 Cal WN 114; *Laxmi* v. *Krishna Bhatia*, AIR 1968 Mys 288.
48. *Waliram* v. *Mukhtiar Kaur*, 70 Punj LR 1112: AIR 1969 Punj 285.
49. *Laxmi* v. *Krishna Bhatta*, AIR 1968 Mys 288.

maintenance under this Act from their daughter in the same way as from their son.[50]

12. MAINTENANCE OF DEPENDANTS [SECTIONS 21 & 22]

At the outset one must note that the right to maintenance under Sections 18, 19 and 20 is against an existing person, i.e. husband, father-in-law, father, mother, son or daughter, as the case may be. Section 21 enumerates the list of persons who are regarded as dependants of a deceased Hindu.[51] Section 22 then lays down certain rules relating to these dependants' right to maintenance. Section 21 for the first time introduces the word "dependant" and some of these dependants are those named in Sections 18, 19 and 20.

The right to maintenance in these previous sections arose from relationship, one must remember, but in Section 21 it arises from the property inherited. This second category of right is therefore of limited liability. The right to maintain, under this section, is based upon the obligation of the heirs to maintain relations of the deceased whom the deceased was bound to maintain.

The heirs of a deceased Hindu are bound to maintain the dependants of the deceased out of the estate inherited by them from the deceased [Section 22(1)].

List of dependants [Section 22]

(1) Father, (2) Mother, (3) Widow, (4) Son, (5) Son of a predeceased son, (6) Son of a predeceased son of a predeceased son, (7) Unmarried daughter, (8) Unmarried daughter of a predeceased son, (9) Unmarried daughter of a predeceased son of a predeceased son, (10) Widowed daughter, (11) Widow of a predeceased son, (12) Widow of a predeceased son of a predeceased son, (13) Illegitimate minor son, (14) Illegitimate unmarried daughter.

The HAMA has completely ignored or denied the claim of a concubine to obtain maintenance from the estate of the paramour. That is the concubine of a man dying, after the commencement of this Act, is not entitled to maintenance.[52]

The main principle underlying Section 22 is that a dependant who has not obtained any share in the estate of the deceased (dying after the commencement of this Act) is entitled to maintenance from those persons who inherit his estate [Section 22(2)].

Where there are several persons who inherit the estate of the deceased their liability shall be in proportion to the value of the share or part of the estate taken by each of them [Section 22(3)]. No person who is himself or herself a

---

50. *Kirtikant D. Vadodaria* v. *State of Gujarat*, (1996) 4 SCC 479.
51. *Supra*, para 6, definitions.
52. *Karuppana Gounder* v. *Chinna Nachammal*, AIR 1974 Mad 329: (1974) 1 Mad LJ 27; 87 Mad LW 27; *Raja Gopala Rao* v. *Sitharamamma*, AIR 1965 SC 1970: (1965) 3 SCR 122; *Ammireddi Ramamoorty* v. *Ammireddi Sitharamamma*, AIR 1961 AP 131: 1960 Andh LT 822: (1960) 2 Andh WR 352 (FB); *T.A. Lakshmi Narasamba* v. *T. Sundaramma*, AIR 1981 AP 88: (1981) 1 Andh LJ 161: (1981) 1 Andh WR 71 (FB).

dependant shall be liable to contribute to the maintenance of others if she or he has obtained a share or part, the value of which is, as would, if the liability to contribute were enforced, become less than what would be awarded to him or her by way of maintenance under the Act [Section 22(4)]. The list of dependants is given in para 6, *supra*. In case of a female Hindu her widowed daughter, her son's widow, the widow of the predeceased son's son and her husband are not her dependants.

A sister has also a right to be maintained by her brother who receives the father's estate but if the sister (unmarried) has received a share in her father's property she has no right to maintenance or a right for her marriage expenses.[53]

The section is prospective and not retrospective.

After a review of the authorities, the Andhra Pradesh High Court in *Pokuru case*[54] has laid down the following rules:

(1) Where one of the members of a HUF dies leaving a widow and other coparceners, the widow shall have a right to maintenance against the surviving coparcener or coparceners for the share of interest of her deceased husband in joint family property which was in his hands.

(2) The obligation to maintain a widow depends upon the taking of the deceased husband's share in the family estate and she will have no right to claim maintenance out of the shares that fall to the other members.

(3) The right of a Hindu woman or a widow to maintenance is founded on relationship.

(4) Where there are several groups of sons, the maintenance of their mothers must, so long as the estate remains joint, be a charge upon the whole estate, but, when a partition is made, their maintenance is distributed according to relationship, the sons of each mother being bound to maintain her.

(5) A stepson has no obligation to maintain his stepmother unless any portion or share of his father in the joint family property is allotted, devolved or taken by him, whereas in case of a son, natural or adopted and a husband, the primary liability to maintain his mother or wife, as the case may be, is a matter of personal obligation arising out of a relationship irrespective of their possession of ancestral or self-acquired property.

(6) A maintenance holder can obtain a decree for maintenance against a member of the husband of the undivided family and create a charge over the joint property, when their family was joint.

---

53. *Pokuru Rangaiah* v. *Pokuru Chinnaiah*, AIR 1970 AP 33, cited in Paras Diwan: *Hindu Law*, 1st Edn., (1995), p. 1368.
54. Paras Diwan: *Hindu Law*, 1st Edn., (1995), p. 1380.

(7) When once her right to maintenance has been declared, defined and reduced to a certainty by a decree of court, such right cannot be taken away by any subsequent alienation of such property by, or partition of such property effected amongst the members of that family.

(8) The heart of the matter is that the charge secured in lieu of maintenance by a Hindu woman or a widow on the joint family properties is not defeated by any subsequent alienation or partition of those properties, but it is liable to be enforced in respect of such properties in whomsoever hands they may be.

(9) Any person, including the stepson of a maintenance-holder, who was a member of the Hindu joint family at the time of the institution of the maintenance suit and the creation of the charge towards the decree obtained by her on the joint family properties cannot question her right over such properties, in case such properties or any portion of the same are allotted to him in a subsequent partition or devolved on him.

(10) The charge created on those properties prior to the division of the family will be subsisting and will continue till the lifetime of the maintenance-holder and the rights of any third party, if any, in such properties will be only subject to the charge created in her favour.

In short under the codified Hindu law[55] (*a*) all members of the joint family, male and females, have a right of maintenance only against the joint family assets, (*b*) there is a personal obligation of a Hindu to maintain his wife, children and parents, (*c*) a Hindu has an obligation to maintain the dependants of another whose property has devolved on him.

There are elements of similarity and difference between provisions of CrPC and those of the HAMA. But there is no contradiction between them. Hence Section 4(*a*) of this Act does not override Section 125 of CrPC. As both stand, a claimant may exercise his option for either of them.

13. AMOUNT OF MAINTENANCE [SECTION 23]

It shall be within the discretion of the court to determine whether any, and if so, what amount of maintenance shall be awarded under this Act.[56] In doing so the court shall have due regard to the following considerations [Section 23(1)]. In spite of discretion given to the court, the fixation of maintenance cannot be a matter of mathematical certainty.[57]

---

55. Paras Diwan: *Hindu Law*, 1st Edn., (1995), p. 1380.
56. *Kiran Bala* v. *Bankim Chandra*, AIR 1967 Cal 603.
57. *Dharamsi D. Patel* v. *Devyani D. Patel*, (1993) 1 HLR 570 (Guj).

(a) Award of maintenance to wife, children or infirm parents [Section 23(2)]

In determining the amount of maintenance, if any, to be awarded to a wife, children or aged or infirm parents regard shall be had to the following five considerations:[58]

(*a*) the position and status of the parties;

(*b*) the reasonable wants of the claimant;

(*c*) if the claimant is living separately, whether he (or she) is justified in doing so;

(*d*) the value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source; and

(*e*) the number of persons entitled to maintenance under the Act [Section 23(2)].

As held in *Ekradeshwari case*[59] by the Privy Council the amount of maintenance depended upon—

(*i*) a gathering together of all the facts of the situation, (*ii*) the amount of free estate, (*iii*) the past life of the married parties and the families, (*iv*) a survey of the conditions and necessaries and rights of the members, (*v*) on a reasonable view of change of circumstances possibly required in the future, (*vi*) regard being, of course, had to the scale and mode of living, and (*vii*) to the age, (*viii*) habits, (*ix*) wants, and (*x*) class of life of the parties.

Section 23(2) substantially accepts these principles except with a little departure and the Supreme Court of India has approved this view in *Kulbhushan case*[60].

Where a minor child is living with the mother the child's "necessaries" would be considered as reasonable want for the mother.

(b) Award of maintenance to a dependant [Section 23(3)]

The court in awarding maintenance to a dependant shall have regard to the following seven matters:

(*a*) the net value of the estate of the deceased, after providing for the payment of his debts;

(*b*) the provisions, if any, made under a will of the deceased, in respect of the dependant;

---

58. *Kampanna* v. *Chima Nachammal*, AIR 1974 Mad 329; *Nala Lalithamba* v. *Yella Venkatalaxmi*, (1970) Andh WR 245. See S. 19.

59. *Ekradeshwari* v. *Hemeshwar*, AIR 1929 PC 128: (1929) 56 IA 182.

60. *Kulbhushan Kumar* v. *Raj Kumari*, (1970) 3 SCC 129: AIR 1971 SC 234; see also *Thayammal* v. *Muthuswami Gounder*, (1970) 1 MLJ 222.

(*c*) the degree of relationship between the two;

(*d*) the reasonable wants of the dependant;

(*e*) the past relations between the dependant and the deceased;

(*f*) the value of the dependant's property and any income derived therefrom; or from his or her earnings or from any other source; and

(*g*) the number of dependants entitled to maintenance under the Act [Section 23(3)].

As said before, in granting the amount of maintenance the court has a wide judicial discretion to exercise. However, one must remember that the discretion is judicial; it is not arbitrary or capricious. It is guided on sound principles of law and is to be exercised within the ambit of the provisions of various sections of this Act, having regard to the object of the Act. As held by the Calcutta High Court, the determination of the amount of maintenance must not be capricious but an exercise of sound judicial discretion.[61]

In one case the wife left her husband without any adequate reasons. The High Court directed the trial court that the quantum should be fixed at a less liberal rate in accordance with the general scheme of the Act and in conformity with the criterion laid down in clause (*c*) of Section 23(2).[62] While determining the quantum of maintenance the court should take notice of events subsequent to the suit.

In *Maganbhai* v. *Maniben*[63], the Gujarat High Court has held that the amount of maintenance to be awarded to a wife can be one-third, and, in a fit case, even one-half, of the husband's income. If the husband's income is on the higher side and he has no other person to maintain except himself, the court would, in a fit case, be justified in awarding even one-half of the husband's income for the maintenance of the wife. Of course this depends upon the circumstances of the case and the needs of the family. As the Bombay High Court has observed[64], in such a suit the income tax return is not the sole guide for determining the income of a party.

One who does not institute a suit for recovery of maintenance amount for an unduly long period cannot be awarded arrears of maintenance at the same rate at which future maintenance is awarded. Quite often they are awarded only at half the rate.[65]

The court has inherent power to fix interim maintenance.[66]

---

61. *Kulbhushan Kumar* v. *Raj Kumari*, (1970) 3 SCC 129: AIR 1971 SC 234; *Kisan Bala* v. *Bankim Chandra*, AIR 1967 Cal 603.
62. *Muthyala Satyanarayan Murthy* v. *Muthyala Jagamma*, AIR 1962 AP 439.
63. AIR 1985 Guj 187.
64. *Vinod Mehta* v. *Kanak Mehta*, AIR 1990 Bom 120.
65. *Laxmi* v. *Krishna Bhatt*, AIR 1968 Mys 288.
66. *Kashi Ram* v. *Ramkalibai*, 1970 MPLJ (N) 20, following *Gouri Gupta* v. *Tarani Gupta*, AIR 1968 Cal 305.

The above are the general principles to guide a court in fixing maintenance but there are other factors also which the court must take into consideration during the exercise of its jurisdiction.

The quantum of maintenance depends upon the fact of each case.[67]

(c) The claimant should be a Hindu [Section 24]

Section 24 is very clear when it says that no person shall be entitled to claim maintenance under this Chapter if he or she has ceased to be a Hindu by conversion to another religion. Thus the right to maintenance is lost by conversion[68] to another religion. If one looks at Section 2 which states that the Act applies only to Hindus, it would be evident that Section 24 is a necessary corollary that follows from Section 2.

In *Amarjit Kaur* v. *Harbhajan Singh*[69] the Supreme Court has laid down relevant considerations for grant of maintenance *pendente lite*. They are:

(*a*) One who demands maintenance should have no such income out of which she can maintain herself.

(*b*) It is for the court to decide what amount should be granted as maintenance, and

(*c*) The matter remains within the discretion of the court.

(*d*) If the husband lays down a condition that his wife should submit the child for DNA test and if the test-report is against the applicant wife, she would not get maintenance. Such a condition is extra-judicial and unreasonable.

In *Shiva Kumar case*[70], the wife filed a petition for nullity of marriage on ground of mental and physical cruelty caused on account of failure to consummate the marriage. She also claimed maintenance *pendente lite* and expenses of proceedings under Section 24 which was decreed. The husband admitted non-consummation but pleaded that it was the wife who deliberately avoided consummation. He pleaded that a decree of nullity could have been passed on his admission (as to non-consummation) thereby disentitling the wife from claiming maintenance. This plea was however negatived and it was held that such admission by the husband cannot be said to be unequivocal. Besides grant of relief under Section 24 is not dependent on the ultimate success of the petition.[71]

---

67. *S. Jayalakshmi* v. *T. Prakash Rao*, (1996) 8 SCC 501. See also *Govardhan Shivcharan* v. *Gangabai*, AIR 1964 MP 168: 1964 MPLJ 175: 1964 Jab LJ 211 (rate of arrears); *Laxmi* v. *Krishna Bhatt*, AIR 1968 Mys 288: 12 Law Rep 580 (Hardship).
68. *Sundarambal* v. *Suppiah*, AIR 1963 Mad 260 (such an amount only till the date of conversion, and not thereafter).
69. (2003) 10 SCC 228.
70. *Shiva Kumar* v. *Pushpa Rekha*, AIR 2004 NOC 253.
71. See *Sandeep Kumar* v. *State of Jharkhand*, AIR 2004 Jhar 23 (No maintenance as the factum of marriage denied. The court rejected this plea. Interim maintenance was granted to wife).

A husband who voluntarily incapacitates himself cannot be absolved of his liability to maintain the wife.[72] In *Sandeep Kumar case*[73] the husband advanced the similar argument that he was unemployed. But rejecting his plea he was ordered to pay Rs 1000 p.m. as maintenance to his wife.[74]

It is common knowledge that in maintenance cases parties rarely disclose their actual income. It is therefore left to the court to make an assessment by taking various factors into consideration. One of the most significant guidelines or factors is the status and lifestyle of the parties.[75] This is so because while income can be concealed, the status is palpably evident to all concerned. If an opulent lifestyle is enjoyed by warring spouses, the husband should not be heard to complain or plead that he had only a meagre income.[76] In awarding maintenance under Section 24 the court has the discretion to order maintenance either from date of application or from date of order or from any other date. However, this is a judicious order and where the court decides not to grant maintenance from date of filing of application then it needs to record reasons therefor. The court was of the opinion that a husband cannot be allowed to do injustice and play tricks with the petitioner; if allowed unscrupulous husbands like the present one will succeed in their oblique motives and mala fide intentions.[77] It must be remembered that the vicissitudes of family income must always be translated and infused into orders granting maintenance. *Bindra case*[78] explains that the court does not grant exactly what is prayed for but usually much less. By that very yardstick it is not precluded to grant more if the circumstances call for it. An order granting maintenance *pendente lite* and litigation expenses arises with filing of application for matrimonial relief and it ends as proceedings terminate. Such an order has no separate existence and hence any revision against it is not maintainable.[79]

Any clause in a contract or consent terms providing against permanent alimony and maintenance would be against public policy. This is so because permanent alimony and maintenance are a larger part of the right to life. *Gita Satish Gokarna case*[80] lays down this proposition and is a significant judgment by the Bombay High Court wherein permanent alimony and maintenance has been construed as an integral part of right to life.[81] Facts in brief are as under:

---

72. *Rousseau Mitra* v. *Chandana Mitra*, AIR 2004 Cal 61.
73. AIR 2004 Cal 61.
74. See also *Vishesh Mathur* v. *Neel Kiran Mathur*, AIR 2004 NOC 399 (Del) (the husband's argument of no income rejected. Ordered to pay Rs 3500 p.m. to wife as interim maintenance).
75. *Radhika* v. *Vineet Rungta*, AIR 2004 Del 323 (the wife did not come with clean hands).
76. *Id.* at p. 323.
77. *Popri Bai* v. *Treeth Singh*, AIR 2004 Raj 129.
78. *S.S. Bindra* v. *Tarvinder Kaur*, AIR 2004 Del 442.
79. *Ramavtar Verma* v. *Chintamani*, AIR 2004 MP 137.
80. *Gita Satish Gokarna* v. *Satish Shankarrao Gokarna*, AIR 2004 Bom 345.
81. This judgment, however, also has a potential of discouraging settlement of matrimonial disputes by mutual consent—XL ASIL (2004) at p. 272.

A marriage was dissolved by mutual consent and as one of the terms of the consent decree the wife agreed not to claim any maintenance/alimony from the husband. However, over two years after the decree, she filed an application under Section 25 for permanent alimony. The trial court said that despite the consent clause (that the wife would not claim maintenance) the wife's application was maintainable. The court ordered the husband to pay Rs 2000 p.m. to the wife. Both the parties appealed — the wife against the quantum and the husband against the maintainability of the wife's claim. The appeals were dismissed. The High Court found no material on record to justify enhancement of the quantum and as regards maintainability of the wife's claim it held that the power to grant maintenance has been conferred on the court by Parliament under the Act and the parties cannot, by agreement oust the court's jurisdiction. It was further held that permanent alimony and maintenance are a larger part of the right to life. These provisions are included "to enable a person unable to maintain herself (or himself?) to be protected. Therefore any clause in a contract or consent terms providing to the contrary would be against public policy."[82] But where neither of them makes an application for grant of permanent alimony nor asks for it in the written statement, grant of permanent alimony by the court at the time of passing a divorce decree sought by the husband was held to be unsustainable.[83]

Right of maintenance is a recurring right and if a person has got a decree for his maintenance, it would become ineffectual from the rate of his conversion to a non-Hindu religion.[84]

(d) Alteration in the amount of maintenance [Section 25]

Section 25 provides that the amount of maintenance whether fixed by a decree of court or by agreement[85], either before or after the commencement of this Act, may be altered subsequently if there is a material change in the circumstances justifying such alteration. This section is an extension or a supplement to Section 23.

This section has retrospective effect. The section confers ample power on the courts to vary, modify or even discharge any order fixing the amount of maintenance made by a decree of court or alter the agreement if entered into by

---

82. *Id.* at 349. XL ASIL (2004) at p. 272. The court cited with approval observations of the Bombay High Court in *Hirabai Bhamcha* v. *Pirojshah Bharucha*, AIR 1945 Bom 537 (the wife's right to future maintenance is a matter of public concern which she cannot barter away.
83. *Mahesh Prasad* v. *Chhoti Bai*, AIR 2004 76 (MP) (NOC). Also see *Arun Kumar Patra* v. *Shila Patra*, (2005) 11 SCC 530 (Interim maintenance enhanced); *Durga Prasanna Tripathy* v. *Arundhati Tripathy*, (2005) 7 SCC 353: AIR 2005 SC 3297 (maintenance *pendente lite* ordered); *Rameshchandra Rampratapji Daga* v. *Rameshwari Rameshchandra Daga*, (2005) 2 SCC 33: AIR 2005 SC 422: (2005) 2 Guj LR 939 [permanent alimony and maintenance can be granted to a spouse whose marriage has been declared null and void (Ss. 9-10, 11, 12, 13, 25)].
84. *Sundarambal* v. *Suppiah Pillai*, AIR 1963 Mad 260: (1963) 1 Mad LJ 186: ILR 1963 Mad 599.
85. That is, agreement as to certain rate and agreement not to claim enhanced rate.

the parties. The court's power is absolute. If a lump sum is fixed for all the time, it can be revised if a case is made out for that. However, if the maintenance is relinquished, the section would have no application. The remedy prescribed under this section can be made use of by filing a suit for modification, etc. and not by a mere application.[86] The widest meaning should be given to the word "agreement" in the section in order to protect the widow from being bound by an unjust agreement. The decree once made under the suit is not final; it may be altered due to changed circumstances.[87]

Abnormal cost of living is a material change in the circumstances justifying enhancement. Judicial notice of this fact can be taken.[88]

(e) Debts to have priority [Section 26]

Subject to the provisions contained in Section 27, debts of every description contracted or payable by the deceased shall have priority over the claims of his dependants for maintenance under this Act. The word maintenance refers to maintenance of the deceased's wife, minor children or aged or infirm parents or his widow or other dependants. In regard to debts contracted by the manager of a joint Hindu family of which the husband was a member, the same rule applies. Of course, such debts must have been incurred for the benefit of the family.

(f) Maintenance when to be a charge [Section 27]

Section 27 reiterates a well-established rule of uncodified Hindu law that a dependant's claim for maintenance shall not be treated as a charge on the estate[89] of the deceased or any portion thereof, unless such a charge is created by (*i*) the will of the deceased, (*ii*) by a decree of court, (*iii*) by agreement between the dependant and the owner of the estate, or (*iv*) portion, or (*v*) otherwise. In short, maintenance is not to be treated as a charge on such estate.

But if the deceased has by his will made it so for other reasons mentioned above at (*ii*) to (*v*) the property is subject to it, there comes into existence a charge on that property. The advantage of securing maintenance as a charge on the immovable property is that the same is not defeated by any subsequent alienation or partition of such property.[90]

---

86. *Kaveri* v. *Parmeshwari*, AIR 1971 Ker 216.
87. *Bakulabai* v. *Gangaram*, (1988) 1 SCC 537, 539: (1988) 1 KLT 413: 1988 Mah LJ 330; *Naresh Chandra Singhania* v. *Deepika*, (2005) 10 SCC 299.
88. *Indra* v. *B.A. Patel*, AIR 1974 AP 303.
89. See *Balkrishna Ramchandra Kadam* v. *Sangeeta Balkrishnan Kadam*, (1997) 7 SCC 500: AIR 1997 SC 3562; *Manjeet Kaur* v. *Inderjit Singh*, AIR 1999 P&H 196; *Sangeeta* v. *Sanjay Bansal*, AIR 2001 Del 267; *Kamlakar Ganesh Sambudas* v. *Tejas Kamlakar Sambudas*, AIR 2004 Bom 479 (the court enlarged the meaning of property).
90. *Bhago* v. *Bachni*, AIR 1972 P&H 169.

The section applies not only in case of a widow or other dependants, but it also applies in case of claim for maintenance of any other person, i.e. wife, minor child, unmarried daughter or an aged or infirm parent. In case the maintenance is made a charge on the estate, and the same is sold, the buyer takes it subject to the charge.

(g) Effect of transfer of property on right to maintenance [Section 28]

In a case where maintenance has not been made a charge on any estate (and the dependant has a right to receive maintenance out of that estate of the deceased) and the estate or any part thereof is transferred, the right to receive maintenance may be enforced against the transferee, if the transferee has notice of that right[91] or if the transfer is gratuitous. This section is based on the principle of equity, justice and good conscience. Therefore a wife can claim its benefit even though she cannot maintain a petition under Section 27 and 28 of HAMA against her husband[92]. But where the transfer is for consideration and the transferee takes it without notice of such right the right of maintenance out of that estate cannot be enforced.[93] [Section 28]

The same rule is applicable in the case of "other person" (e.g. wife, child, unmarried daughter or an aged or infirm parent) having a right of maintenance.

(h) Right of maintenance not transferable

Right of maintenance being a personal right, it cannot be the subject of assignment by a person (he or she) whether the claim to be transferred is for past maintenance or for future maintenance.[94] When a suit for recovery of maintenance is filed by him or her and he or she dies, the same abates and cannot be prosecuted further by his or her legal representatives.[95] The right is not heritable also.[96]

[B]

GENERAL LAWS

1. THE FAMILY COURTS ACT, 1984

(a) General

The Family Courts Act, 1984, which extends to the whole of India except the State of Jammu and Kashmir, has 6 Chapters and 23 Sections. This Act was

---

91. *Govinda* v. *Parvathi*, 1971 KLR 481; *Rani Bai* v. *Yadunandan Ram*, (1969) 1 SCC 604: AIR 1969 SC 1118.
92. *Sarwan Singh* v. *Jagir Kaur*, (2006) 1 HLR 743.
93. *See* Section 39, Transfer of Property Act, 1882.
94. *Satyalehama Anand* v. *B.S. Chetti*, (1959) 1 Andh WR 133.
95. *Ibid.*
96. *Sheela Rani* v. *Jagdish Chandra Sharma*, AIR 2004 Del 158.

enacted by Parliament on 14-9-1984 and it has come into force on different dates in different States (Section 1).

Section 2 defines a ''Judge'', ''notification'', ''prescribed'' and ''Family Court''. Words and expressions used but not defined in this Act and defined in the Civil Procedure Code, 1908, shall have the meanings respectively assigned to them in that Code.

Sections 3, 4, 5 and 6 (Chapter 2) provide for ''Establishment of Family Courts'', ''Appointment of Judges'', ''Association of Social Welfare Agencies'', and ''Counsellors, Officers and other employees of Family Courts'' respectively.

Chapter III (Sections 7, 8) is regarding Jurisdiction, Chapter IV (Sections 9 to 18) provides for procedure of the Court, Chapter V (Section 19) provides for Appeals and Revision and Chapter VI (Sections 20 to 23) is regarding miscellaneous matters.

(b) Concept, purpose and status

The concept of Family Court essentially discards the adversarial procedure. Before this Act came into force matrimonial disputes were adjudged by a District Judge. The District Judge tried all sorts of cases, civil and criminal. In such cases the crucial question was either success or failure. Trial of cases with this aim in view is an adversarial method. However one should understand that matrimonial matters should not be viewed in terms of failure or success of a legal action. Such matters are fraught with complex social therapeutic problems. And these problems require solution, an equitable and just solution. One may say therefore that *matrimonial litigation* is one wherein parties and their counsel are engaged in resolving family conflicts, wherein humane considerations outweigh everything else. Consequently a *matrimonial Court* should work in a manner as to conserve and not disrupt family life, it should be helpful and not harmful to individual partners and their children and lastly it should be preservative rather than punitive to family and marriage.

As observed by a well-known writer a *matrimonial dispute* in present days is not a litigation in which parties and their counsel are engaged in winning or defeating a legal action, but it is an inquisition in which parties, social workers, lawyers, welfare officers and psychiatrists are engaged in finding out a solution in familial problems. The Family Court is therefore a blessing for families in trouble. It resolves complex familial problems with maximum fairness and minimum bitterness, distress and humiliation.

This should make the concept, purpose and the status of a family court clear. The status of the Family Court is higher than the Income Tax Tribunal and lower than the High Court. From its order or decision an appeal lies to the High Court.

(c) Constitution

The State Government after consultation with the High Court, and by a notification shall, for every area in the State comprising a city or town, whose population exceeds 10 lakhs, establish a Family Court and specify its jurisdiction (Section 3). It shall appoint qualified judges, and in doing so preference shall be given to women. Section 4(4)(*a*) lays down the expectations required of a Family Court judge. But it would be quite difficult to find such a person.

Rules may be made by the State Government to associate with social welfare agencies (Section 5).

(d) Jurisdiction [Section 7]

The Family Court—

(1) shall exercise all the jurisdiction exercisable by any district court or any subordinate civil court and it shall be deemed for this purpose to be a District Court or a subordinate Civil Court.

To remove any doubt in the matter of jurisdiction an Explanation is added to sub-section (1) of Section 7. Accordingly, the following suits and proceedings come within the purview of the court, i.e. a suit or proceeding—

(*a*) for a decree of nullity of a marriage (i.e. declaring a marriage to be null and void, annulling the marriage), or restitution of conjugal rights or judicial separation or dissolution of marriage (divorce);

(*b*) for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(*c*) for the property of the parties or of either of them;

(*d*) for an order or injunction in circumstances arising out of a marital relationship;

(*e*) for a declaration as to the legitimacy of any person;

(*f*) for maintenance; and

(*g*) for the guardianship of the person or the custody of or access to any minor.

Some hold a different view and say that besides the above matters, the problems regarding (1) dowry, (2) inter-spousal assaults, (3) torts, (4) familial assaults, and (5) other criminal matters between spouses and children, and (6) inter-spousal or (7) inter-familial contracts and torts should also come within the sway of the Family Court. However this view is rejected being very wide and uncertain.

It should be noted that the Family Court has been conferred jurisdiction for granting maintenance to wives, children and parents (*see* Section 10). Till now this jurisdiction was conferred on a First Class Magistrate under Chapter IX,

Section 125 of the Criminal Procedure Code, 1973. Jurisdiction in any other matter may also be conferred on the Court [Section 7(1) and (2)].

As a result of the above provisions, Section 8 excludes the jurisdiction of other civil and criminal courts to take cognizance of any suit or proceedings of the above nature. This prohibition applies to pending proceedings also. Such pending suits and proceedings have to be transferred to the Family Court (Section 8).

(e) Procedure [Sections 9 to 14]

It is the duty of the court to assist and persuade the parties in arriving at a settlement of their problems. For this purpose, the court, subject to rules made by the High Court, follows such procedure as it thinks fit. The Court may adjourn a case for settlement under Section 9(2) and this power to adjourn is in addition to and not in derogation of any other power to adjourn the proceedings [Section 9(3)].

The provisions of the Civil Procedure Code shall apply to suits and proceedings and the court shall be deemed to be a Civil Court having all powers of a civil court [Section 10(1)]. To proceedings under Chapter IX of the Code of Criminal Procedure, the provisions of that Code would apply [Section 10(2)]. The Court is free to lay down its own procedure to arrive at a settlement of the subject matter in issue. [Section 10(3)]

The procedure of the Family Court is thus less formal and less technical than the procedure under other suits. The same informality is accepted in its judgment too.

The proceedings of the court are held *in camera* (Section 11) to maintain confidentiality of court records. It is obligatory on the court to do so. The Court can secure the services of a medical expert or a welfare expert to assist it. (Section 12)

(f) Undesirability of lawyers' interference

No party has a right to be represented by a legal practitioner but the Court, in the interest of justice, may seek the assistance of a legal expert as *amicus curiae* (Section 13). Though there is a strong opinion for the exclusion of a lawyer's services in a "Family Court", in complicated family cases a lawyer's services cannot and should not be dispensed with altogether. Professor Paras Diwan holds this view.[97]

(g) Bombay High Court's view

As held in *Leela* v. *Mahadeo*[98] this section does not bar the presence of a lawyer. Whenever necessary the court should freely make available the services

97. *Law of Marriage & Divorce*, (2000), Chap. 14, p. 881.
98. AIR 1991 Bom 105.

of lawyers. And this is clear when Section 13 lays down in its proviso that the Court may seek the assistance of a legal expert as *amicus curiae* if it considers it necessary in the interest of justice. Thus services of a lawyer are an adjunct of the Family Court; it is an auxiliary service; it is a part of the concept of Family Court. No Family Court system can succeed without a well-organised support service. Such services lessen the adversarial atmosphere if the lawyers are specifically well trained.

(h) Components of auxiliary service

As observed by Dr Paras Diwan[99] such an auxiliary service should have the following four component services:

(1) Family counselling and reconciliation and conciliation service;

(2) Investigative service;

(3) Legal aid service; and

(4) Enforcement service.

The first component service dissolves itself into a three-tier service as follows:

(*a*) *Premarital counselling*: Here the services of a lawyer are not a part of the Family Court system, it is available to all since it would be a community service.

(*b*) *The reconciliation and conciliation counselling service* would be available to the parties before they go to court. Not only this but when the parties are in court they can avail of these services. Its purpose is to promote reconciliation where it is possible. In case it is not possible an amicable settlement of all the issues could be secured. This service can get issues clarified and problems defined.

(*c*) In its third role the service provides *post-adjudicatory counselling service*. This service helps the parties to find out their post-divorce disputes and problems.

The second component service investigates the facts of the dispute and submits its report to the Court so as to facilitate the court to arrive at a decision.

The legal aid service, the third component, makes available to the parties assistance of competent lawyers when they go to court.

The enforcement service provides help and assists a party to enforce an order of the Court obtained in its favour. Such proceedings drag on for a long time and the party obtaining an order in his favour is not able to get the desired relief. The enforcement service thus looks after the enforcement of orders.

---

99. *Leela* v. *Mahadeo*, AIR 1991 Bom 105, p. 882.

Section 12 of the Act visualises some such support services, and this is clear from the language of the section.

In present times such high professional standards and expectations from lawyers do not seem to bear any fruit unless some of them and the judges presiding in Family Courts are trained. There should be a continuing education and training programme for lawyers, judges and personnel of Family Courts if the Family Court system is to succeed.[1]

(i) Evidence and decree

Section 14 explains that such a court may receive reports, documents, information and evidence which in its opinion would assist the court in arriving at a decision, whether or not the same is relevant or not under the Indian Evidence Act, 1872. The court shall record a memorandum of the substance of what the witness deposes (instead of recording evidence at length). This shall be signed by the witness and the judge and would form the court's record (Section 15). Affidavits are also accepted in evidence (Section 16). The judgment of the Court shall contain a concise statement of the case, the point for determination, the decision thereon and the reasons for such decision (Section 17).

A decree of the Family Court has the same force and effect as a decree or order of a civil court. It shall be executed in the manner prescribed by the Code of Civil Procedure, 1908. An order passed by the court under Chapter IX of the CrPC, 1973 shall be executed in the manner prescribed by that Code (Section 18). Where there is no Family Court, the decree or order of the Family Court has to be executed by the District Court.

(j) Miscellaneous

An appeal from the order or decree of the Family Court lies to the High Court, both on facts and law (Section 19).

Section 20 provides that the Family Court overrides other statutes pertaining to family matters.

The High Court under Section 21, the Central Government under Section 22 and the State Government under Section 23 can makes rules for carrying out the purposes of this Act.

OTHER LAWS

2. MAINTENANCE PROCEEDINGS UNDER THE CRIMINAL PROCEDURE CODE: SECTION 125-128

Object of provisions of Section 125

Section 125 is enacted for social justice and specially to protect women and

1. We should have separate permanent institutions for this.

children as also old and infirm poor parents and falls within the Constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution. The provisions give effect to the natural and fundamental duty of a man to maintain his wife, children and parents so long as they are unable to maintain themselves.

The sections of statutes calling for construction by courts "are not petrified print but vibrant words with social functions to fulfil". The brooding presence of the Constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause — the cause of the derelicts.[2]

There is no inconsistency between Section 125 and the provisions of the 1956 Act. The scope of the two laws is different.[3]

The provisions of Section 125 are applicable and enforceable whatever may be the personal law of the parties. Personal law is relevant for deciding the validity of the marriage and therefore cannot be altogether excluded from consideration.[4]

That the provisions regarding this civil matter appear in the Criminal Procedure Code has two reasons behind it: The first is that civil matters are decided after a very very long time in comparison with criminal complaints. Secondly, the cost of litigation in civil matters is heavy compared to criminal matters. To get rid of these two disadvantages it was thought fit to include these provisions in the Criminal Procedure Code so that a speedy and economical remedy would be available.[5]

These provisions apply to persons belonging to all religions and have nothing to do with the personal laws of the parties.[6]

(a) Who can claim maintenance under Section 125

The following persons can claim maintenance:

(*a*) *Wife* who is unable to maintain herself, or

(*b*) *legitimate or illegitimate minor child*, whether married or not, unable to maintain itself, or

(c) *legitimate or illegitimate child* (not being a married daughter) *who has attained majority*, where such child is, by reason of any physical or mental abnormality or injury, unable to maintain itself, or

---

2. *Savitaben Somabhai Bhatiya* v. *State of Gujarat*, (2005) 3 SCC 636: AIR 2005 SC 1809: (2005) 2 Guj LR 1378.
3. *Ibid.*
4. *Ibid.*
5. *See* Law Commission's 41st Report and also *Bhagwant Dutt* v. *Kamla Devi*, (1975) 2 SCC 386.
6. *Krishan Kaur* v. *Kartar Singh*, 1988 Cri LJ 717.

(*d*) *father or mother*, unable to maintain himself or herself.

(1) The "wife" may be of any age — minor or major. The term includes a divorcee wife who has not remarried.[7] The definition of wife has been made wide here because there are peculiar personal laws which permit a husband to divorce his wife at any time at his will. The object of this is to give social justice to the divorced wife. Wife means a legally married wife and the legality of marriage is governed by the personal law of the parties.[8]

Marriage of a woman in accordance with Hindu rites with a man having a living spouse is a complete nullity in the eye of the law. Such a woman is therefore not entitled to the benefit of Section 125 CrPC or the Hindu Marriage Act, 1955. The scope of Section 125 cannot be enlarged by introducing any artificial definition to include a woman not lawfully married in the expression "wife".[9]

(2/3) A minor child, legitimate or illegitimate[10], but unable to maintain itself can also claim maintenance[11]. Minor means a person who, under the provisions of the Indian Majority Act, 1875 is deemed not to have attained majority.[12] The child may be male or female. A minor married girl may be entitled to claim maintenance from her husband or her father if the husband has no sufficient means to maintain her. The father of such minor female child is required to maintain her until she attains majority.[13]

If the legitimate or illegitimate child is a major but suffers from any physical or mental abnormality or injury and is unable to maintain itself, it can claim maintenance. A married minor daughter who has attained majority can claim maintenance from her husband.

(4) A father or mother can also claim maintenance if any of them is unable to maintain himself or herself.

Not only a son but also a daughter, whether married or unmarried, would be liable to maintain the parents. The social obligation to maintain one's parents equally applies to a daughter[14], said the Supreme Court. "Mother" does not include stepmother.

---

7. Expln. (*b*) to S. 125(1).
8. *Savitaben Somabhai Bhatiya* v. *State of Gujarat*, (2005) 3 SCC 636: AIR 2005 SC 1809: (2005) 2 Guj LR 1378.
9. *Ibid*.
10. *Ibid*.
11. S. 125(1)(*b*).
12. Expln. (*a*) to S. 125(1).
13. Proviso to S. 125(1).
14. *Vijaya Manohar Arbat* v. *Kashirao Rajaram Sawai*, (1987) 2 SCC 278: 1987 Cri LJ 977.

If there are two or more children the parents may seek remedy against any one or more of them.

(b) From whom maintenance can be claimed

A husband, a father, a son, or a daughter is bound to maintain a wife, child, father or mother. However a mother is not bound to pay maintenance to the father or son and daughter.[15]

(c) Conditions for granting maintenance

(1) A person from whom maintenance is claimed must have "sufficient means" to maintain.

(2) He must have neglected or refused to maintain the person entitled to claim maintenance from him.

(3) A person who claims maintenance must be unable to maintain himself or herself.

(4) Where maintenance is claimed by a wife, she would be entitled to it only if she fulfils the following conditions:

(*i*) that she is not living in adultery,[16]

(*ii*) that she must not refuse, without sufficient cause, to live with her husband,[17]

(*iii*) that she is not living separately by mutual consent.[18]

(d) Who has jurisdiction

A Judicial Magistrate of the first class can deal with and decide the petition for maintenance. Order of any other Magistrate in this regard is null and void.[19]

Proceedings in this regard may be taken against a person in any district—

(*a*) where he is, or

(*b*) where he or his wife resides, or

(*c*) where he last resided with his wife or, as the case may be, with the mother of illegitimate child [Section 126(1)].

In regard to a deserted wife the venue of the proceedings would be the place where she may be residing on the date of the application for maintenance. This is for the convenience of such a wife.

---

15. *Ahathinamiligai* v. *Arumugham*, 1988 Cri LJ 6 (Mad).
16. S. 125(4).
17. S. 125(4) and S. 125(3) Explanation.
18. S. 125(4).
19. S. 461(*g*), CrPC.

(e) Procedure

There is no period of limitation prescribed for filing such an application. Such application must be clear, specific and must state that the wife is unable to maintain herself and that the party neglecting or refusing to maintain has sufficient means to maintain the applicant.

In *Shantha* v. *B.G. Shivananjappa*,[20] the appellant wife and her daughter were granted maintenance amounting to Rs 500 and Rs 300 respectively by the Magistrate on 20-1-1993. Since the amount was not paid and no warrant was issued by the Magistrate, the appellant wife filed a petition claiming Rs 5365 as arrears of maintenance from 20-1-1993 to 31-8-1993 (date of filing the petition). The respondent husband's the revision against the order of the trial court was dismissed by the Sessions Judge as well as the High Court. He failed to pay the amount due. Thereafter, the appellant wife filed an interim application in the main petition claiming arrears of maintenance amounting to Rs 46,000 from 20-1-1993 to 16-6-1998 (date of filing the interim application). The respondent deposited Rs 5365 but he objected against the further claim on the ground that the interim application filed on 16-6-1998 was barred by limitation under the first proviso to Section 125(3).

Held that the main petition filed in 1993 was pending and kept alive, and the subsequent interim application was filed only to specify the exact amount accrued upto that date. Such application was only supplementary or incidental to the main petition which was admittedly filed within the period of limitation. Hence bar under the first proviso to Section 125(3) was not applicable to interim application. It was further held that insisting on filing successive applications is unreasonable since liability to pay maintenance is a continuing liability.[21]

Evidence shall be taken and recorded per Section 126(2) and in a suitable case an *ex parte* order also can be made which may be set aside on showing good cause [Section 126(2)].

(f) Order

The Magistrate may at his discretion order a monthly allowance of any suitable amount.[22] In giving this amount the requirement of the wife, her standard of living and her separate source of income are factors to be taken into account by the court. If the order is disobeyed a warrant of recovery can be issued by the court. The person who disobeys might be imprisoned too—and his imprisonment would not satisfy his liability which he has incurred. As observed by the Supreme Court, such an imprisonment is "a mode of enforcement; it is not a mode of satisfaction of the liability".[23] His property also may be put up for

---

20. (2005) 4 SCC 468: 2005 SCC (Cri) 1089: AIR 2005 SC 2410: (2005) Cri LJ 2615.
21. *Shantha* v. *B.G. Shivananjappa*, (2005) 4 SCC 468: 2005 SCC (Cri) 1089: AIR 2005 SC 2410: (2005) Cri LJ 2615, paras 2, 7 & 8.
22. Limit of Rs 500 as monthly allowance has been removed by the Code of Criminal Procedure (Amendment) Act, 2001 of 24-9-2001.
23. *Kuldip Kaur* v. *Surinder Singh*, (1989) 1 SCC 405: AIR 1989 SC 232.

sale, to satisfy the warrant. A copy of such maintenance order is supplied free to the person in whose favour it is made. The order of maintenance can be enforced against any person anywhere in India.

On proof of change of circumstances the allowances can be altered. The order made under Section 125 stands till it is vacated or cancelled.

3. THE SPECIAL MARRIAGE ACT, 1954 AND DIVORCE ACT, 1869

Similar provisions for ''alimony *pendente lite*'' and ''permanent alimony and maintenance'' exist under Sections 36 and 37 of the Special Marriage Act, 1954 (Chapter 7) and Sections 36 and 37 (Chapter 9) of the Divorce Act, 1869.

Chapter XX

Minority and Guardianship

SYNOPSIS

A. General
B. Application of the Act [Section 3]
C. Definitions [Section 4]
D. Guardian
E. Overriding effect of the Act [Section 5]
F. Main changes brought about by the Hindu Minority and Guardianship Act, 1956
G. Natural guardian [Sections 6, 7]
H. Powers of a natural guardian [Section 8]
I. Testamentary guardians and their powers [Section 9]
Powers
J. Minor's incompetency to act as a guardian of property [Section 10]
K. De facto guardians [Section 11]
L. Guardian appointed by a court
M. Guardianship regarding minor's undivided interest in joint family property [Section 12]
N. Minor's welfare to be the paramount consideration [Section 13]
Explanation
Concept of "welfare of the child" and custody
O. Duties, rights, powers and liabilities of a guardian appointed by court

A. GENERAL

The Hindu Minority and Guardianship Act, 1956 is the third portion of the Hindu Code Bill which was passed and which received the President's assent on 25th August, 1956. The Acts extends to the whole of India except the State of Jammu and Kashmir. It has been extended to Dadra and Nagar Haveli and Pondicherry.[1] As stated in Section 2 of the Act the provisions of this Act are, in addition to and not in derogation of, the Guardians and Wards Act, 1890, except as hereinafter expressly provided. It must be noted that on account of enforcement of this Act both the Hindu Law and Hindu customs and usages and the Guardians and Wards Act, 1890 ceased to have effect with regard to (*i*) any matter for which a provision has been made in the Act; and (*ii*) any matter so far as it is inconsistent with any of the provisions contained in this Act. If the Act of 1956 is silent on any particular point, the Guardians and Wards Act, 1890 would remedy the defect.

Since a minor, due to want of understanding capacity in him, is incapable of taking care of his person and property every legal system has provided for his guardianship. It must be said therefore that it is a rule without exception that a minor is not a *sui juris*.[2] As observed by A.B. Rohtagi J., in *Om Prakash* v. *Child Welfare Board*,[3] "children are most vulnerable group in any population and in need of the greatest social care. The State has the duty of according

1. Section 1.
2. *See* Indian Contract Act, S. 2; Estate Duty Act, 1953, S. 3(1)(*a*).
3. AIR 1980 Del 137: ILR (1980) 1 Del 498.

proper care and protection to children at all times, and it is on their physical and mental well being that the future of the nation depends."

Looking into the old texts and the Hindu law that was administered during the British period one may say that the law of guardianship is based upon the incapacity of the minors, lunatics and idiots to look to their interests and to manage them. It becomes necessary, therefore, to entrust the management to some proper guardians who can manage them. A minor, one should remember, has no capacity to contract and contracts entered into by him are totally void.[4] The person who supplied his necessaries to the minor has to look to the estate of the minor for reimbursement under the Contract Act.[5] Such incapacities of a minor were therefore responsible for ushering in a guardian for him who could protect him and could supplement his defects. The Hindu law, as held in *Suryaprakasham case*[6], has conditioned the extent and limit of the guardian's capacity.

The law relating to guardianship and minority is contained in the Guardians and Wards Act, 1890 and Hindu Minority and Guardianship Act, 1956. Besides this the Hindu Marriage Act, 1955 also declares certain persons to be guardians in marriage.

The provisions of this Act are supplemental to the Guardians and Wards Act. This is so because this Act of 1956 does not codify the entire law of minority and guardianship applicable to Hindus. The Act however consolidates the provisions as to who are entitled to be natural and testamentary guardians and presents certain limitations on powers of such guardians as to the disposal and management of the property of a minor. A guardian may be a *de facto* guardian, an *ad litem* guardian or an *ad hoc* guardian and the *Karta* of a Hindu joint family also acts as a guardian of the minor members of the family.

There was formerly a difference of opinion as to the age of minority but the same has been put to an end to by the passing of the Indian Majority Act, 1865, according to which a person attains majority at the age of 18. If a guardian has been appointed of his person and property the person is deemed to have attained majority when he completes 21 years.[7]

B. APPLICATION OF THE ACT [SECTION 3]

Looking to the preamble of this Act one may at once note that the Act amends and codifies *certain parts of the law* relating to minority and guardianship among Hindus. It does not purport to cover the whole range of the subject abovesaid.[8]

See the Hindu Marriage Act, 1955, Section 2.

---

4. *Mohri Bibi* v. *Dharmadas Ghose*, 30 IA 314: ILR 1930 Cal 539.
5. Section 68.
6. *Suryaprakasham* v. *Gangaraju*, AIR 1956 AP 33.
7. *Sadho Lal* v. *Murlidhar*, (1907) 29 All 672; *Jagan* v. *Mahadeo*, 36 Cal 768.
8. *Narayan Laxman Gilankar* v. *U.K. Kaushik*, (1994) 1 HLR 492 (Bom).

C. DEFINITIONS [SECTION 4]

(*a*) "Minor" means a person who has not completed the age of eighteen years;

(*b*) "Guardian" means a person having the care of the person of a minor or of his property or of both his person and property, and includes—

(*i*) a natural guardian,

(*ii*) a guardian appointed by the will of the minor's father or mother,

(*iii*) a guardian appointed or declared by court, and

(*iv*) a person empowered to act as such by or under any enactment relating to any court of wards.

(*c*) "Natural guardian" means any of the guardians mentioned in Section 6.

D. GUARDIAN

Besides the above guardians there are other guardians also—

(*a*) *de facto* guardian,[9]

(*b*) *ad hoc* guardian.

This shows that the definition of the word guardian given in the Act is not exhaustive. The word "includes" used in the definition of "guardian" [Section 4(*b*)] shows this. The definition is thus inclusive and not exhaustive. There is thus a scope to include other types of guardians (*see* Section 11 of the Act, *ad hoc* guardian). It must also be noted that the definition of the term guardian given under the Guardians and Wards Act, 1890 is similar to the one given under this Act.

E. OVERRIDING EFFECT OF THE ACT [SECTION 5]

5. *Overriding effect of Act.*—Save as otherwise expressly provided in this Act:

(*a*) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(*b*) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

Section 5 repeals all the existing laws whether they are enactments, customs, usages or ancient texts, if they are not consistent with the Act. However, it has to be remembered that the following matters have been retained:

(*a*) the natural guardianship of an adopted son (Section 7);

(*b*) testamentary guardians and their powers (Section 9);

(*c*) incapacity of a minor to act as a guardian of any property (Section 10);

(*d*) non-appointment of a guardian for minor's undivided interest in joint family property (Section 12); and

(*e*) the welfare of a minor to be paramount consideration in the appointment of a guardian (Section 13).

---

9. See *Ratan* v. *Bisan Ramachandra Pardeshi*, AIR 1978 Bom 190.

In respect of matters expressly dealt with in this Act, the provisions of this Act have overriding effect.[10]

F. MAIN CHANGES BROUGHT ABOUT BY THE HINDU MINORITY AND GUARDIANSHIP ACT, 1956

Like the old law, the Act of 1956 recognises only the parents in the case of a minor child and the husband in the case of a minor wife as the natural guardians. It maintains the preference accorded to the father as between the father and the mother. The mother is accepted or recognised as the guardian of her illegitimate children, as was provided under the earlier law. However, the following changes have been made in the prior law:

(*a*) There was a long list of natural guardians under the earlier Hindu law. The present Act has brought it to three only.

(*b*) Age of minority amongst Hindus is made the same as under the general law (Section 4).

(*c*) Under the earlier law for guardianship of minor a father was preferred to the mother and he was entitled to the custody of the children; under this Act the custody of a minor who has not yet completed five years shall ordinarily be with the mother (Section 6).

(*d*) As per Sections 8 and 9 of the Act, control over the powers of natural and testamentary guardians is imposed.

(*e*) A *de facto* guardian, prior to this Act, could alienate even immovable property and bind the minor's estate by his acts; this Act now declares that a *de facto* guardian has no such powers.

(*f*) Section 9 of the Act takes away from the father his right to appoint a guardian for the minor by a will, during the lifetime of the mother.

(*g*) The Act vests the mother with the power to appoint, by will, a guardian who would act in preference to a guardian appointed by the father.

(*h*) Contrary to the earlier law, now, a parent, as the present Act provides, who has ceased to be a Hindu or has become a hermit or an ascetic is not recognized by the Act as a natural guardian of his or her minor child.

(*i*) Natural guardian's power to alienate the minor's property for legal necessity or for the benefit of the estate, has been taken away. Such a guardian can do so only with the court's prior permission.

(*j*) Under earlier law a minor husband could be his minor wife's guardian, but the new legislation under Section 10 categorically states that no minor can be a guardian.

G. NATURAL GUARDIAN [SECTIONS 6, 7]

6. *Natural guardians of a Hindu minor.*—The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are:

10. *Kusa* v. *Baishnab*, ILR (1965) Cut 839: AIR 1966 Ori 60.

(*a*) in the case of a boy or an unmarried girl—the father, and *after* him, the mother:

Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(*b*) in the case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;

(*c*) in the case of a married girl—the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—

(*a*) if he has ceased to be a Hindu, or

(*b*) if he has completely and finally renounced the world by becoming a hermit (*vanaprastha*) or an ascetic (*yati* or *sanyasi*).

***Explanation.*—In this section, the expressions "father" and "mother" do not include a stepfather and a stepmother.**

7. *Natural guardianship of adopted son.*—The natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother.

If we look to Section 4 it says that a natural guardian means any guardian mentioned in Section 6 and the section lays down certain rules for it.

Natural guardian is one who becomes so by reason of his natural relationship with the minor. A natural guardian nurtures a child and he does not, in this matter, require the support of any court's order for the purpose.[11] The father and the mother are the natural guardians of a minor. Between the father and the mother the father has priority to act as a guardian.[12] On the father's death (and not before) the mother steps into that position. If however the father, by his will, appoints some other person as the guardian of a minor the mother cannot act as the minor's guardian.

During the father's lifetime if he refuses or disables himself on account of his conduct to act as such guardian, the mother does not become entitled or is not regarded as a natural guardian. It is only the order of the court, as held by the Patna High Court in *Narain* v. *Sapurna*[13], by reason of which she becomes a lawful guardian. The mother's remarriage does not disentitle her to act as a natural guardian of her minor children. Similarly a mother is the natural guardian of her illegitimate child except in cases where the father of a child is ascertained.[14]

Section 6, clause (*a*) accepts the established rule of Hindu law that in case of a boy or an unmarried girl the father is the natural guardian and, after him, the mother is the natural guardian of such a person. Clause (*b*) states that in the case of an illegitimate boy or an illegitimate unmarried girl, the mother and after

---

11. *Dakshinamurthy, In re*, (1969) 1 MLJ 345. See also *Yeshoda* v. *Sindhura*, (2002) 1 HLR 641 (Kant).
12. *D. Rajaiah* v. *Dhanapal*, AIR 1986 Mad 99.
13. AIR 1968 Pat 318; *see* also *Bhaktavatsalam* v. *Muthuram*, (1965) 78 Mad LW 573. *See* also *Jijabai Vithalrao Gajre* v. *Pathankhan*, (1970) 2 SCC 717: AIR 1971 SC 315 (position before HMGA).
14. *Rajalaxmi* v. *Ramachandran*, AIR 1969 Mad 113.

her the father is the natural guardian. In case of an unmarried girl, as per clause (*c*), her husband is her guardian.

In *Githa Hariharan case*[15] the constitutionality of Section 6(*a*) was challenged. It was alleged that it violates Articles 14 and 15 of the Constitution in as much as the mother of a minor is relegated to an inferior position on the ground of sex alone since her right as a natural guardian is made cognizable "after" the father in the said provision.

As the facts go, in this case Petitioner 1 and her husband jointly applied to the first respondent, the Reserve Bank of India (RBI), for the issue of relief bonds in the name of their son. They expressly stated that both of them agreed that the mother of the child (i.e. 1st petitioner) would act as the guardian of the minor for the purposes of investments made with the money held by their minor son. Accordingly in the application form the first petitioner signed as the guardian of the minor. The bank requested them either to produce the application form signed by the father of the minor or a certificate of guardianship from a competent authority in favour of the mother. The bank maintained that the mother is not the guardian of a minor as stated in Section 6(*a*) of the Hindu Minority and Guardianship Act, 1956. The petitioners therefore filed a writ under Article 32 of the Constitution, with prayers to strike down Section 6(*a*) of the Act and Section 19(*b*) of the Guardians and Wards Act (GWA), 1890, as violative of Articles 14 and 15 of the Constitution, and to quash and set aside the decision of the RBI refusing to accept the deposit from them. They also prayed for issue of a writ of *mandamus* directing the acceptance of the same after declaring the first petitioner as the natural guardian of the minor.

At this time divorce proceedings of the petitioner were going on[16] and the husband had prayed for the custody of their minor son. Against this Githa prayed, by a petition to the Court, for maintenance for herself and her son. The husband often wrote to the school authorities and to his wife that he was the only natural guardian of the minor. The School, he stated, therefore should not take any decision regarding the child without his permission. Against this the wife filed a writ petition to strike down Section 6(*a*). She narrated in the application that her husband did not care for her and for the welfare of her child; he had an interest only in the guardianship of the child. He wanted his rights without discharging his duties, she said.

The court[17] observed that in Section 4(*b*) of the Hindu Minority and Guardianship Act, 1956 there is no such discrimination and the mother is a natural guardian as provided in Section 6.

The words "the father and after him the mother" in Section 6(*a*) of the Hindu Minority and Guardianship Act, 1956 do not say that the mother is the natural guardian *after the lifetime* of the father. The mother can be replaced as a

---

15. *Githa Hariharan* v. *Reserve Bank of India*, (1999) 2 SCC 228: AIR 1999 SC 1149.
16. Writ petition No. 1016/1991.
17. *Per* Anand, CJ. and Srinivasan, J.

natural guardian in place of the father even during his lifetime when the father is indifferent or careless or mentally or physically weak to take steps for the welfare of the child. If a mother is not able to act as a natural guardian of the child without having recourse to court it would be against the Constitution since it violates the "gender equality clause" which is the basic principle of our Constitution. The word "after" therefore means "in the absence of" and the word "absent" means where the father is alive but is mentally incapable or is indifferent to discharging his obligations.

This interpretation will not only apply to the Hindu Minority and Guardianship Act but will also apply to the Guardians and Wards Act. The judgment will operate prospectively.

Where a minor has an undivided interest in the joint family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest,[18] provided that nothing in this section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect of such interest.

Section 6 recognises a well-established principle that with regard to guardianship of a child the paramount consideration shall be the welfare of the child, hence the provision that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. This does not mean that the child should be taken away from the mother and given to the father as soon as he completes five years. The sole consideration in this regard would be the welfare of the child. His Lordship U.C. Banerjee in *Githa Hariharan case*[19] gave a separate but concurring judgment. He held that in view of the Universal Declaration of Human Rights, the convention for Elimination of all Forms of Discrimination Against Women (CEDAW) and the Constitution of India, Section 6(*a*) is challenged on the ground of gender bias, that it puts an embargo or suspension on the mother's guardianship during the lifetime of the father.

The Indian law as well as the English law upholds the supremacy of the welfare of the child in the matters of his guardianship and custody. He referred to *J.V. Gajre* v. *Pathankhan*[20] in which the Supreme Court accepted the mother as the natural guardian of her daughter since she was under her care and protection and her father ignored her for 20 years and his disinterest in his daughter was "as good as he was non-existent" for her. But according to his Lordship this case lent no assistance to settle the issue of constitutionality of Section 6(*a*) HMGA but on the basis of the concept of the welfare of the child. However, there is no hard and fast rule that a mother has a preferential right.[21]

---

18. S. 12, Hindu Minority and Guardianship Act, 1956.
19. *Githa Hariharan* v. *Reserve Bank of India*, (1999) 2 SCC 228.
20. (1970) 2 SCC 717.
21. *Radha* v. *Rangappa*, AIR 2004 Kant 299, remarks of the Court that the father has the preferential right of guardianship and custody of the minor smack of gender discrimination.

A Hindu widow when she remarries retains her right of guardianship over her minor child. A mother's right to act as a natural guardian of her child after the father is, one must note, absolute and unconditional.[22]

At the end, Section 6 provides that (*a*) if a person has ceased to be a Hindu, or (*b*) if he has completely and finally renounced the world by becoming a hermit (*vanaprastha*) or an ascetic (*yati* or *sanyasi*) he shall not be entitled to act as the natural guardian of a minor under this section. As the Explanation to the section goes, in this section "father" and "mother" do not include, (*c*) a stepfather, and (*d*) a stepmother. Thus there are four disqualifications [i.e. (*a*), (*b*), (*c*), (*d*) above] for a person to act as a minor's natural guardian.

At this juncture one must ponder over the provisions stating disqualifications. This position existed before 1850 under the uncodified Hindu law. Later on, the Caste Disabilities Removal Act, 1850 removed this disqualification and consequently a person could not be debarred from acting as a natural guardian of his minor child due to change of his religion.[23] A number of High Courts have ruled to this effect.[24] However, quite strangely, the same bar is reimposed by Section 6 of this Act. And we say that Bharat is secular.[25]

Section 7 provides that the natural guardianship of an adopted minor son, passes, on adoption, to the adoptive father and after him to the adoptive mother. This section is silent about an adopted daughter. That is so because the Hindu Adoptions and Maintenance Act, 1956 which permits the adoption of a girl was enacted later. If one looks to Section 12 of that Act[26] it would seem that, the adoptive father and after him the adoptive mother would be regarded as the natural guardians of the adopted daughter. Thus the adoptive father and mother would be regarded as the natural guardians of the adopted child, i.e. son or daughter.

H. POWERS OF A NATURAL GUARDIAN [SECTION 8]

Section 8 of this Act deals with powers of a natural guardian with reference to immovable property of a minor. Prior to the enactment of this Act a natural guardian had very wide powers to deal with such property. The section runs as under:

> **8. *Powers of a natural guardian.*—(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts, which are necessary or reasonable and proper for the benefit of the minor or for the realisation, protection or**

---

22. *Kumar V. Jahgirdas* v. *Chethana Ramatheertha*, (2004) 2 SCC 688: AIR 2004 SC 1525 (from Kant). See also *Girish* v. *Shankaran Nair*, (2001) 1 HLR 210 (Ker).
23. *Khunnilal* v. *Gobind Krishna Narain*, ILR (1911) 33 All 356.
24. *Kanahi Ram* v. *Biddyaram*, ILR (1904) 1 All 549 (560); *Kaulesra* v. *Jorai Kasaunudhan*, ILR (1906) 28 All 233, 235; *Mohamed Yakub* v. *Radhibai*, AIR 1918 Sind 32 (34); *Hari Chand* v. *Gulam Rasul*, AIR 1932 Lah 385, 386.
25. On this point an enthusiast may refer to A.M. Bhattacharjee: *Hindu Law and the Constitution*, 2nd Edn., (1994), Chap. 5, pp. 123-158, and Tahir Mahmood: *Personal Laws in Crisis*, (1986), Lecture 1, pp. 12-18.
26. Hindu Adoptions and Maintenance Act, 1956.

benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the court:

(*a*) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor, or

(*b*) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him.

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in case of necessity, or for an evident advantage to the minor.

(5) The Guardians and Wards Act, 1890 (8 of 1890), shall apply to and in respect of an application for obtaining the permission of the court under sub-section (2) in all respects as if it were an application for obtaining the permission of the court under Section 29 of that Act, and in particular:

(*a*) proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of Section 4-A thereof;

(*b*) the court shall observe the procedure and have the powers specified in sub-sections (2), (3) and (4), of Section 31 of that Act; and

(*c*) an appeal shall lie from an order of the court refusing permission to the natural guardian to do any of the acts mentioned in sub-section (2) of this section to the court to which appeals ordinarily lie from the decisions of that court.

(6) In this section, "court" means the city civil court or a district court empowered under Section 4-A of the Guardians and Wards Act, 1890 (8 of 1890), within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such court, means the court within the local limits of whose jurisdiction any portion of the property is situate.

As the section provides, a natural guardian of a minor has powers to do all[27] acts—

(*i*) which are *necessary* or *reasonable and proper* (*a*) for the *benefit of the minor,* or (*b*) for the realisation, protection or *benefit of the minor's estate*;

(*ii*) but the guardian in no case can bind the minor by a personal covenant—Section 8, sub-section (1).

The natural guardian, as sub-section (2) provides, shall not, without the previous permission of the court,[28] do the following two things:

(*a*) he shall not mortgage or charge or transfer by sale, gift, exchange or

---

27. *Palani Pillai* v. *Sengamalathachi*, AIR 1962 Mad 160: (1962) 1 Mad LJ 393 (Cannot do anything which injures minor's property); *Panni Lal* v. *Rajinder Singh*, (1993) 4 SCC 38, para 8 (protect minor's property from depredations); *Dhanasekaran* v. *Manoranjithammal*, (1993) 1 HLR 218 (Mad DB) (Interest of sole surviving coparcener is also covered by Section 8.)

28. *M. Venkat Mani Kanthu*, (2006) 1 HLR 192 (AP DB). (Parent as a guardian can seek court's permission).

otherwise, any part of the minor's immovable property[29], or

(*b*) he shall not lease any part of such property for a term exceeding five years or for a term extending for more than one year beyond the date on which the minor would attain majority.

Any disposal of a minor's immovable property which contravenes the limits laid down in sub-section (2) above will make the transaction voidable at the minor's instance or at the instance of anyone claiming through him. One has to mark that such a transfer is voidable and not void. The minor can choose to accept it or he may repudiate it [sub-section (3)]. In a recent case the specific performance of a contract for alienation of a minor's share of immovable property by the mother was declined by the court because it was in violation of Section 8(2) and (3).[30] If the guardian seeks the court's permission no court shall grant it except in case of necessity or for the evident advantage to the minor [sub-clause (4)]. Permission should be sought before the transaction takes place.[31]

As sub-section (5) provides, to such an application made by a natural guardian, provisions[32] of the Guardians and Wards Act, 1890 would apply and the court would protect the minor's interest.

When property for a minor is to be purchased no such permission as contemplated by Section 8 is neeessary. Thus contract to purchase a house entered on behalf of and for the benefit of minors by their mother as natural guardian is valid and binds the minor. It is not a personal covenant and therefore does not come within the ambit of sub-section (1) of Section 8. Consequently payment of the purchase price is the minor's liability under the Transfer of Property Act, 1882.[33] If the purchase of property is for the minor's benefit the contract may be specifically enforced by the court.[34]

Application for sale, etc. of property by a guardian should be made to the City Civil Court or the District Court within whose jurisdiction the immovable property is situated. If the application for permission is rejected an appeal lies against such an order to the court to which appeals ordinarily lie from the decision of such a court.

To do all acts which are necessary or reasonable and proper for the benefit of the minor

As decided by the Supreme Court in *Manik Chand case*[35], after passing of the Act of 1956 the natural guardian, as laid down in Section 8(1), has been empowered to do all such acts which are necessary for the welfare and benefit

---

29. *Ramades Menon* v. *Sreedevi*, AIR 2004 Ker 126 (FB).
30. *Kallathil Sreedharan* v. *Komath Pandyala Prasanna*, (1996) 6 SCC 218.
31. *Hariharan* v. *Parvathi Kutty Amma*, (1990) 1 HLR 207 (Ker).
32. *See* Sections 29, 4-A and 31 of Guardians and Wards Act, 1890.
33. *Manik Chand* v. *Ramchandra*, (1980) 4 SCC 22: AIR 1981 SC 519.
34. *Radhey Shyam* v. *Kiran Bala*, AIR 1971 Cal 341.
35. *Manik Chand* v. *Ramchandra*, (1980) 4 SCC 22: AIR 1981 SC 519.

of the minor. Section 8(1) therefore has connection with the person of a minor: that is to say, the natural guardian can place restraint on the minor with regard to his upbringing, education, health, etc. and he can delegate his authority in this regard to a tutor or a school teacher. He can also revoke this authority. He can protect the minor from bad company and may for this purpose decide the place of the minor's residence.

Moreover this part of the section has no application to cases where the manager of a joint family property alienates the minor's joint interest in the family property for the need of the family or for the minor's benefit.

A natural guardian can strike a compromise of a doubtful claim, can acknowledge a debt or extend the limitation period or submit a matter to arbitration provided it is for the protection of the minor or for the benefit of the minor's property.

I. TESTAMENTARY GUARDIANS AND THEIR POWERS [SECTION 9]

Prior to the passing of the Hindu Minority and Guardianship Act, 1956, a Hindu father could not nominate a guardian of his children and thus exclude even the mother from guardianship. In case of death of the father, the mother did not have the power to appoint a testamentary guardian. A testamentary guardian can be appointed by a Will.

This position is now changed as would be evident from the Section 9 which runs as under:

> **9.** ***Testamentary guardians and their powers.*****—(1) A Hindu father entitled to act as the natural guardian of his minor legitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in Section 12) or in respect of both.**
>
> **(2) An appointment made under sub-section (1) shall have no effect if the father predeceases the mother, but shall revive if the mother dies without appointing, by will, any person as guardian.**
>
> **(3) A Hindu widow entitled to act as the natural guardian of her minor legitimate children, and a Hindu mother entitled to act as the natural guardian of her minor legitimate children by reason of the fact that the father has become entitled to act as such, may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in Section 12) or in respect of both.**
>
> **(4) A Hindu mother entitled to act as the natural guardian of her minor illegitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property or in respect of both.**
>
> **(5) The guardian so appointed by will has the right to act as the minor's guardian after the death of the minor's father or mother, as the case may be, and to exercise all the rights of a natural guardian under this Act to such extent and subject to such restrictions, if any, as are specified in this Act and in the will.**
>
> **(6) The right of the guardian so appointed by will shall, where the minor is a girl, cease on her marriage.**

As per sub-section (1) of Section 9 a Hindu father, can, now, by will appoint a guardian for the person as well as property of his minor children.

This position has one exception that so far as the undivided interest of the minor in the joint family property is concerned, no such testamentary guardian can be appointed [Section 8(1)]. Sub-section (2) declares that such an appointment will have no effect if the father dies before the mother. This is so because the mother in that case becomes the natural guardian. However, the sub-section further provides that in case of death of the mother, without appointment by will of a guardian, the appointment made by the father would revive. Consequently, now, a father cannot appoint a testamentary guardian so as to exclude the mother from her right to act as such as declared by Section 6.

Sub-section (3) provides that in case the father becomes disentitled to act as the natural guardian a Hindu widow or a Hindu mother can, by a will, appoint a guardian for the person as well as property of her minor legitimate children. Under uncodified law no such right was given to the mother. To this principle the same exception, as is enumerated in sub-section (1) above, is attached. A similar situation in regard to the appointment of a guardian by a Hindu mother for her illegitimate children prevails [sub-section (4)]. Thus a Hindu mother is a natural guardian for her legitimate and illegitimate children and can therefore appoint a guardian for them by a will. It must be noted at this juncture that the father has no right to appoint a testamentary guardian for his illegitimate children. However, on the mother's death the father becomes the guardian of such illegitimate children.

The guardian so appointed by Will has the right to act as the minor's guardian after the death of the minor's father or mother, as the case may be, and to exercise all the rights of a natural guardian under this Act to such extent and subject to such restrictions, if any, as are specified in this Act and in the Will [sub-section (5)].

As sub-section (6) informs when a testamentary guardian is appointed of a minor girl, the rights of such a guardian would cease on the marriage of the girl. It must be remembered that after her marriage the girl's husband becomes her natural guardian.

Powers

As said in the beginning, prior to the passing of this Act, i.e. under the old, uncodified Hindu law, a father could nominate a guardian for his children and could exclude even the mother from guardianship. Such a guardian had very wide powers and he was subject to the restrictions contained in the father's will only; consequently he could sell, mortgage or otherwise dispose of the property of the minor even without the court's sanction.

Now, under the 1956 Act the guardian's powers are so curtailed and restricted that he can exercise only the rights of a natural guardian subject to restrictions shown in Section 8 above and subject to restrictions shown in the will itself. For example, under the old earlier law if he was justified by circumstances, a testamentary guardian could sell or mortgage a considerable

portion of the minor's immovable property whereas now such a transaction would require the court's permission before entering into it. This is apparent if we consider the just effect of Sections 8 and 9 of the Act.

J. MINOR'S INCOMPETENCY TO ACT AS A GUARDIAN OF PROPERTY [SECTION 10]

A minor, as contemplated and recognised by implication by the Guardians and Wards Act, may act as the guardian of his minor wife's or child's property. However, this rule is superseded by Section 10 of the Act, which provides as under:

> **10. *Incapacity of minor to act as guardian of property.*—A minor shall be incompetent to act as guardian of the property of any minor.**

As per the wordings of the section a minor is incompetent to act as a guardian of the property of any minor, but then who stops him from becoming and acting as the natural guardian of the *person of his minor wife and children*? This right of the minor is not touched by the Act; it stands preserved therefore.

K. DE FACTO GUARDIANS [SECTION 11]

Before the passing of the Hindu Minority and Guardianship Act, 1956 a *de facto* guardian had the same powers of alienating the property of his ward as a natural guardian.[36] But now after 25th August, 1956 no person shall be entitled to dispose of or deal with the property of a Hindu minor, whether immovable or movable, merely on the ground of his or her being the *de facto* guardian of the minor. Section 11 regarding *de facto* guardian is as under:

> **11. *De facto guardian not to deal with minor's property.*—After the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the *de facto* guardian of the minor.**

A *de facto* guardian is not recognised by the Act. Such a guardian is one who undertakes the general management and care and custody of the minor of his own. In law there is nothing like a *de facto* guardian. There can only be a *de facto* manager.[37] When a natural guardian exists, there can be no *de facto* guardian.[38]

Such persons are the relatives or friends or the well-wishers of the minor—and take this work out of love and affection for the minor.

A stranger gifting some property to a minor cannot himself become or clothe another person with the character of such property of the minor.[39] A sale

---

36. See *Hanuman Parsad* v. *Babooee*, (1856) 6 MIA 393; *Kasturi* v. *Sabinivis*, AIR 1970 AP 440 (alienation voidable only like that made by a legal guardian). See also *Panchu* v. *Hrishikesh*, AIR 1960 Cal 446 (alienation by a *de facto* guardian for legal necessity of minor cannot be impeached).
37. *Kondamudi Sriramulu* v. *Myneni Pendarikakshayya*, AIR 1949 FC 218: 1949 FCR 65; *Madhegowda* v. *Ankegowda*, (2002) 1 SCC 178.
38. *Palchuri Hanumayamma* v. *Tadikamalla Kotlingam*, (2001) 8 SCC 552.
39. *Rajlaxmi* v. *Ramachandran*, ILR (1967) 3 Mad 778: AIR 1967 Mad 113: (1966) 2 MLJ 420.

by a *de facto* guardian is void *ab initio*.[40] As held in *Vishwambhar* v. *Laxminarayan*[41] such an alienation is voidable and not void *ab initio*. However *Madhegowda case*[42] holds that such an alienation is *per se* invalid and void *ab initio*. Here legal necessity is not relevant. Transference of such an alienation would not get any interest therein and for removing such an alienation no suit is necessary. In such cases, when a minor attains majority, he can repudiate such alienation.

Section 11 has thus brought a material change in the law relating to a *de facto* guardian.

L. GUARDIAN APPOINTED BY A COURT

Such a guardian is appointed under the Guardians and Wards Act. He has no power to alienate the minor's property without the court's prior permission. If he does so without permission, such an alienation is voidable at the instance of the minor and other persons affected thereby (Sections 29 and 30, Guardians and Wards Act, 1890).

M. GUARDIANSHIP REGARDING MINOR'S UNDIVIDED INTEREST IN JOINT FAMILY PROPERTY [SECTION 12]

Section 12 speaks about the appointment of a guardian in respect of a minor's undivided interest in the joint family property. The section is reproduced below:

> **12. *Guardian not to be appointed for minor's undivided interest in joint family property*.—Where a minor has an undivided interest in joint family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest:**
>
> **Provided that nothing in this section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect of such interest.**

The provisions are very clear. They say that when a minor's undivided interest in the joint family property is under the management of an adult member of his family (for example, minor's father), no guardian shall be appointed for such undivided interest of the minor. The apparent reason is that the manager of a joint Hindu family would be the guardian in respect of the minor's interest in such property. Now, if the father is the manager, he would be such a guardian. But the father here cannot appoint a testamentary guardian for the minor's property. If he dies, the mother takes his place. The eldest son can be the manager and custodian of the minor's undivided interest. If all the sons were minors the proviso to the section comes into force and, as decided by the Madras High Court in *Seetha* v. *Narasimha*[43], the court may appoint a guardian

---

40. Ibid.; *Daneyi* v. *Raghu*, AIR 1967 Ori 68; *Onkarnath Dube* v. *Dy. Director, Consolidation*, AIR 1977 All 4; *Madhukar Vishwanath* v. *Madhao*, (1999) 9 SCC 446.
41. (2001) 6 SCC 163: AIR 2001 SC 2607: (2001) An LT 27 (SC).
42. *Madhegowda* v. *Ankegowda*, (2002) 1 SCC 178: AIR 2002 SC 215.
43. (1945) 1 MLJ 60.

till one of the minors attains majority. Thus this section substantially confirms the law which prevailed before the passing of this Act.

If the minor is a member of a *Mitakshara family*, the father is the *Karta* who manages the whole property. On his death this right passes to the eldest son and he becomes *Karta*. The reason as to why no guardian can be appointed for a minor's undivided interest in the joint family property is that the minor's interest is not a separate one. Such a case therefore would be governed by the general principles of Hindu law in regard to joint family property.

N. MINOR'S WELFARE TO BE THE PARAMOUNT CONSIDERATION [SECTION 13]

Section 13 of the Act reiterates a well-established principle in appointment or declaration of any person as the guardian of a Hindu minor, *the welfare of the minor will be the paramount consideration.*[44] This rule forms the very keystone of the whole of the law on this subject; it must be remembered. As to what matters are to be considered while appointing a guardian by a Court, one must refer to Section 17 of the Guardians and Wards Act, 1890. The section reads as under:

> **13. *Welfare of minor to be paramount consideration.*—(1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.**
>
> **(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.**

Explanation

In this section the word "welfare" is to be understood in a very wide sense. The word therefore includes not only the material and physical well-being of the minor, but also every factor connected with the moral and religious welfare, education and upbringing of the minor.[45] In determining as to what will be for the welfare of the minor, the court would have regard to, inter alia, the age, sex and religion of the minor, the character and capacity of the guardian, his nearness of kin to the minor, the wishes if any of the minor's deceased parent and the previous and existing relations of the minor with the proposed guardian. If the minor is old enough to give an intelligent preference, the court may also consider it.

The second part of the section provides that if the court is of the opinion that the appointment of a particular person as guardian will not be for the welfare of the minor such a person shall not be entitled to be the minor's guardian even if by virtue of the provisions of this Act he or she is otherwise

---

44. *Sunil Kumar* v. *Sati Rani*, AIR 1969 Cal 573; *Subrahmanyam* v. *Santha*, AIR 1967 AP 294; *Mohini* v. *Virender Kumar*, (1977) 3 SCC 513: AIR 1977 SC 1359.
45. *Raj Kumar Mahant* v. *Indra Kumari*, 1972 MPLJ 725.

entitled to be so under the provisions of this Act or of any other law relating to guardianship in marriage among Hindus (sub-section 2).

In one case[46] a husband applied for the custody of his minor wife. The wife was an intelligent and educated girl of seventeen who could think for herself. The court did not grant the husband's request as the wife was unwilling to go to him. Under the circumstances grant of husband's prayer should be conducive to the minor's welfare. Similarly in *Raichand case*[47] a father-in-law was sought to be appointed as guardian of his sixteen-year-old widowed daughter-in-law. The court observed that the father-in-law's claim must be subordinated to the paramount consideration of the minor's welfare and as she was of sufficient age to form an intelligent preference her wishes should also be considered.

One should remember that Section 6 of this Act cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. In *Surinder Kaur case*[48] the question was as to with whom should a boy aged seven-and-a-half live. The court observed that it is not possible to accept that the boy's welfare requires that he should live with his father or with the grand-parents. It cannot be said that it would be less for the welfare of the boy if he lived with the mother whose income if not considerably large, is not so low as not to enable her to take responsible care of the boy. The boy, from his own point of view, ought to be in the custody of the mother.

Concept of "welfare of the child" and custody

Section 13 of the Act gives very wide powers to the court; so much so, that the courts have power to override all other provisions of this Act as well as of the Guardians and Wards Act. Under the section the welfare of the child is the sole consideration. Not only in the appointment and declaration of a minor's guardian but also in the welfare of the child lies the paramount consideration. "Guardianship is not a right, but a responsibility. Today the parental considerations are not considered to be sacred; they are not sacrosanct; it is the child's welfare that is sacrosanct." This welfare principle is enacted in sub-sections (1) and (2). In the interest of the child the provisions of Section 19 of the Guardians and Wards Act could be got over. Section 19 of the Guardians and Wards Act lays down that the father or husband cannot be displaced from guardianship of the minor unless they are unfit. Section 13 read with Section 4 of the Hindu Minority and Guardianship Act entitles the court to ignore the provisions of Section 19 in the interest of the child. Thus parent's rights are subordinate to the "welfare of the child"

---

46. *Subrahmanyam* v. *Santha*, AIR 1967 AP 294; see also *Basanti Bai* v. *Mohanlal*, ILR (1951) 7 Raj 938: AIR 1958 Raj 267.
47. *Raichand* v. *Sayarbai*, AIR 1966 Mad 173.
48. *Surinder Kaur Sandhu* v. *Harbax Singh Sandhu*, (1984) 3 SCC 698, 702, 703: 1984 SCC (Cri) 464: AIR 1984 SC 1224.

principle. There are a number of decisions in this regard.[49] In *L. Chandran* v. *Venkatalaxmi*[50], wherein the case-law on this point has been reviewed "the court gave a stunning blow to supremacy of paternal rights and drew support from Article 21 of the Constitution and observed that the child has to be regarded as a person who has a right to life as guaranteed by Article 21. 'Life' has to be understood, here, as something comprehending more than mere animal existence. Consequently, the theory of a father's unconditional rights to his child's person and custody contravened this constitutional guarantee since adherence to the theory would reduce the child to the position of a chattel[51] from the position of person." Therefore the custody of the child can be handed over to the father only if it was conducive to the welfare of the child.

It should, however, be noted that in deciding this point the court should not stick to mechanical jurisprudence, ignoring emotional and psychological tremors that would be created by uprooting of the child where it had all along grown and to transplant it in new surroundings. One has to remember that there is a conflict between two principles here; one is supremacy of the paternal right principle, and the other is paramountcy of the welfare of the child principle, and the courts are oscillating between the two. The Bombay, Jammu and Kashmir, Karnataka, Orissa, Patna, Delhi and Kerala High Courts adhere to the latter principle[52] while the Rajasthan and Madhya Pradesh High Courts prefer the former one. The right to be appointed as a guardian of the minor is not a fundamental right.[53]

Regarding determination of minor's interest the HMGA is quite silent. However, as held in *Sanjeev Malhotra* case[54] the following can be the criteria for the welfare of the minor:

> (*i*) the age of the minor; (*ii*) minor's sex[55]; (*iii*) his religion; (*iv*) character of the proposed guardian[56] and his capacity; (*v*) the nearness of kin of the proposed guardian to the minor; (*vi*) wishes of the deceased parents of the minor; (*vii*) relations of the proposed guardian with the minor and his property; (*viii*) preference of the minor where he is old enough to

---

49. *Reade* v. *Krishna*, ILR (1886) 9 Mad 391; *Atchayya* v. *Kosarji Narhari*, AIR 1929 Mad 81; *Suppiah* v. *Suppiah*, AIR 1935 Mad 363; *Rai Chand* v. *Sayer Bai*, AIR 1966 Mad 179; *Bhagya Laxmi* v. *Narayana Rao*, AIR 1983 Mad 9.
50. AIR 1981 AP 1, *per* P.A. Chaudhary, J.
51. See also *Narmita Kapur* v. *Anil Kapur*, (1988) 24 Rep Del 14.
52. *Sanju* v. *Sobhanath*, AIR 1995 All 90; *Sheela* v. *Jivanlal*, AIR 1988 AP 275.
53. *Sahibzada Saiyed Muhammed Amirabbas Abbasi* v. *State of M.B.*, AIR 1960 SC 768: (1960) 3 SCR 138. But see *Githa Hariharan's case*, (1999) 2 SCC 228.
54. *Sanjeev Malhotra* v. *Union Territory, Chandigarh*, (1998) 1 HLR 307 (P&H).
55. *Kala Aggarwal* v. *Suraj Prakash Aggarwal*, (1993) 1 HLR 145 (Del DB).
56. *Puran* v. *Argoori*, 1976 HLR 801 (Del).

form an intelligent preference;[57] (*ix*) and the law to which the minor is subject.[58]

O. DUTIES, RIGHTS, POWERS AND LIABILITIES OF A GUARDIAN APPOINTED BY COURT

See Chapter 3 of the Guardians and Wards Act, 1890. The provisions of the Act of 1956 are supplemental to the Act of 1890.

---

57. *Raichand Nethaji* v. *Sayar Bai*, AIR 1966 Mad 173; *Satyendra Nath Maitra* v. *Balaram Chakraborty*, AIR 1981 Cal 206: (1980) 2 Cal LJ 427: 1980 HLR 727.
58. *Ashok Kumar Jatav* v. *Kumari Roshni*, (2006) 1 HLR 325.

Chapter XXI

A Postscript

SYNOPSIS

Modern Hindu Law and the Constitution

1. General
2. The postulates
3. At present
4. Issues
5. Opinions
6. Questions unanswered
7. Religion-based discrimination under modern Hindu law
8. Religion-based discrimination under the secular laws on marriage and succession
9. Sex-based discrimination
10. Where all this leads to
11. Possible solution

MODERN HINDU LAW AND THE CONSTITUTION[1]

1. GENERAL

After India won independence the legislation about personal laws was entrapped and entangled in the vortex of national politics and public debate. The issue of personal laws suffered concussions due to varied opinions of legislators and the public and these opinions are reflected by our Constitution in the form of (*i*) fundamental rights, (*ii*) directive principles, (*iii*) relation between Centre and the States, and (*iv*) the temporary, transitional and special provisions. One has to test our personal laws on the touchstone of these ideals, principles and provisions[2] concerning personal laws, contained in the Constitution, because the personal laws operate within the framework of these Articles.

2. THE POSTULATES

The essence of these Articles forming the framework can be condensed into three basic postulates:

(1) That the personal laws in force till the end of the pre-constitutional era shall continue to apply unless the State, as a part of its function to set up social order based on social justice or to provide social welfare and reform, considers it advisable to repeal, modify or replace it.

(2) That henceforth all laws enacted in this area must conform to the provisions of Part III of the Constitution dealing with Fundamental Rights.

(3) That the State shall gradually lead the nation on a voyage of progressive uniformity in the area of civil laws.

---

1. T. Mahmood: *Personal laws in Crisis*, (1986), pp. 1 to 48; A.M. Bhattacharjee: *Modern Hindu Law and the Constitution*, 2nd Edn., pp. 123-158.
2. Arts. 13(1), 13(2), 14, 15, 25(1), 25(2), 26(*b*), 29(1), 38, 44, 246 and 372, Constitution of India.

3. AT PRESENT

But where do we stand at present? Have we correctly understood their meaning, implications and demands? Are these postulates simple and clear enough to be translated into action without any conflict or tension? Have their custodians and subscribers been going along the right path in the matter of their implementation?

So far as Hindu law is concerned, before the Constitution came into force there were as many as thirty-five central and local laws in force. By virtue of Article 372 all these laws of every variety got a temporary statutory lease till the time they were altered, repealed, amended or adapted. Neither Parliament nor the President acted in this respect and their inaction have continued these laws. Article 372 therefore, does retain — till further action — all the uncodified personal and customary laws as it does apply to all the central and local enactments from which the courts derive their authority to apply these laws.

In the area of personal laws therefore the following are in force at persent in this country:

(*i*) The pre-1950 laws of Muslims, Christians, Parsis and Jews;

(*ii*) the post-1950 codified laws of Hindus, Buddhists, Sikhs and Jains;

(*iii*) some traditional laws of these four communities, not yet repealed, and

(*iv*) laws commonly applicable or available to all Indians.

4. ISSUES

As regards conformity of all these laws to Part III of the Constitution, two different issues arise:

(*a*) Is the system of communitywise personal laws in itself *ultra vires* Article 14 of the Constitution and will statutory reform of some of these laws only, to the exclusion of others, be repugnant to that Article?

(*b*) Are the diversities found within a particular personal law, codified and uncodified, hit by Articles 14 and 15 of the Constitution?

5. OPINIONS

On the first issue there are differences of opinion. One group of scholars and critics have a convinced opinion that the continued application of different personal laws to different communities is hit by (*i*) the constitutional provisions protecting *fundamental right to equality before the law* and (*ii*) *equal protection of laws.*

Another section of critics regard reform of one particular law only, to the exclusion of another, as an *unconstitutional discrimination.*

However, legal luminaries like the late Shri M.C. Chagla and the late Shri P.B. Gajendragadkar believed otherwise as judges. It would be strange to note that these persons in their public life remained great protagonists of secularization and unification of personal laws prevailing in India[3].... The need and receptivity of a particular community in this regard, according to them, would be a valid criterion for singling it out. *Narasu Appa case*[4] bears testimony to their opinion. A number of High Courts have subscribed to this view and so far no court has expressed that it is *ultra vires* the Constitution and even the Supreme Court is also not an exception.[5] In *Mathura Ahir case*[6] the Supreme Court ruled that Part III of the Constitution does not trench upon personal laws.

But eminent scholars like D.D. Basu, H.M. Seervai, and Mohammad Ghouse differ from the judicial opinion. Justice A.M. Bhattacharjee, in his M.N. Bose Lectures[7] of 1981, has severely criticized the verdict in *Mathura Ahir case*.

Dr. Mahmood thinks[8] that this is but the only way in which various provisions of the Constitution can be reconciled to get rid of conflicts and tensions. Shahnaz Sheikh has challenged in the Supreme Court the validity of the Muslim law relating to marriage, divorce and adoption. Let us see what stand the court now takes.

6. QUESTIONS UNANSWERED

There are a number of questions in personal laws which remain unanswered, e.g.

(*a*) Why Hindu law does not admit a woman to the position of *Karta*?

(*b*) Why Muslim law does not give equal shares to men and women in heritable properties?

(*c*) Why the caste system is left undisturbed in spite of the clear provisions of Articles 17 (anti-untouchability) and 14 (equality doctrine)?

(*d*) Why traditional classification of *Lingayats* as *Shudras* was not unconstitutional?

(*e*) Who is to decide whether a particular personal law matter (e.g. adopting a child or writing out a Will) is "practice" of religion or is in fact a "secular activity associated with religion"?

---

3. M.C. Chagla: *Inaugural Speech, Proceedings of the 26th Congress of Orientalists*, (1964), pp. 79-80; *"Plea for Common Civil Code"*, Round Table, pp. 7-9 (Delhi 25 March, 1969); R.B. Gajendragadkar: *Secularism and the Constitution of India*, (1971), pp. 124-127; Mahmood: *Personal Law in Crisis*.
4. *State of Bombay* v. *Narasu Appa Mali*, AIR 1952 Bom 84: 53 Bom LR 779, approved.
5. *Mahant Moti Das* v. *S.P. Sahi*, AIR 1959 SC 942.
6. *Shri Krishna Singh* v. *Mathura Ahir*, (1981) 3 SCC 689: AIR 1980 SC 707.
7. A.M. Bhattacharjee: *Modern Hindu Law and the Constitution*, (1983).
8. Pp. 18-20.

(*f*) What is the definition of the term "secular" and can the christening, circumcision and *Mundan* (or *Aqiqah*) of a child and burial or cremation of corpses also be regarded as secular activity associated with religion?

(*g*) What do we mean by "*practice of religion*", "*secular activity associated with religion*" and a fundamental right to "*conserve*" *one's* "*distinct culture*"? Is "distinct culture" found in personal law? If yes, does Article 29 conflict with Article 25 or 14 or 15?

(*h*) Why nobody demands that all Hindus should be governed by one and the same law in all circumstances in all parts of the country?

(*i*) Why do our courts not take note of the perplexing diversities pervading each of our personal laws and suggest ways and means for their elimination?

(*j*) All these provisions providing for divorce and deprivation of right to give in adoption and the liability to pay maintenance on the ground of loss or change of religion, clearly run counter to the provisions of the Caste Disabilities Removal Act, 1850. Have we not given religion a much more dominating position and effective role than it had ever before?[9]

These are baffling questions to which systematic, scientific, logical and uniform answers are hard to find.

The fact is that most of the statutory laws enacted in the area of personal laws are replete with provisions discriminating between person and person on the basis of religion, sex, domicile or place of birth. It is said that behind this lies the wisdom of our ancient law givers. We may not in our wisdom question this but what about the wisdom of our modern Parliament and State legislatures which have both retained in the old personal law statutes and also straight away introduced into the newly-enacted personal laws discriminatory provisions much more pronounced than those under the conventional personal laws? Where is the Constitutional sanction for such legislative provisions? For these discriminatory provisions one may look into the following paras.

7. RELIGION-BASED DISCRIMINATION UNDER MODERN HINDU LAW

Under the *Hindu Marriage Act, 1955*, post-marriage conversion by either spouse furnishes to the other spouse a ground for divorce.[10] Change of religion is thus treated under this Act as an unpardonable matrimonial offence against which it provides the remedy of divorce to the spouse who has remained a Hindu, wholly neglecting the interest of the converting spouse. In such a case, where the aggrieved spouse, in a hurry, rushes to the court with a divorce

9. A.M. Bhattacharjee: *Modern Hindu Law and the Constitution*, 2nd Edn., (1984), pp. 123-136.
10. S. 13(1)(*ii*).

petition, the court cannot even offer an initial period of judicial separation[11]— even if it visualizes bright prospects of a happy married life for the parties with some reconciliatory efforts.

Under the *Hindu Succession Act, 1956*, children born to a Hindu after he or she has adopted another religion, as also the descendants of such children, are disqualified from inheriting the property of a Hindu relative — unless any such child or descendant has re-adopted Hinduism before the opening of succession.[12] Under this provision, innocent persons are made to suffer by reason of the accident of their birth which, unfortunately for them, may have taken place after one of their parent's (or a higher ancestor's) conversion. At the same time there is a clear inducement for reconversion to Hinduism for the sake of obtaining property.[13]

Under the *Hindu Minority and Guardianship Act, 1956* if a father or mother has renounced Hinduism, he or she is deprived of the right to act as the natural guardian of his or her minor Hindu child.[14] The same is the law for the husband of a minor wife — he too cannot, after renouncing Hinduism, act as his minor wife's guardian even if she herself so desires.[15]

Under the *Hindu Adoptions and Maintenance Act, 1956* a married male needs his wife's consent for adoption only if she remains a Hindu; if she has changed her religion, he need not consult her.[16] By analogy, the husband can perhaps also ignore his wife in the matter of adoption if she is, since the inception of a marriage, a non-Hindu (in other words, if the man has contracted an inter-religious marriage). Similarly, a married woman can directly adopt a child irrespective of the wishes of her non-Hindu husband[17]— while if he is a Hindu, she can be only a consenting party to adoption by him and cannot herself adopt a child.[18] The natural father of a Hindu child can give it in adoption without caring how his non-Hindu wife reacts to it — while the wife can easily veto his action if she is a Hindu.[19] Where the father himself has changed his religion, the right to give the child in adoption passes on to wife if she is a Hindu, and she can exercise it without even consulting her non-Hindu husband.[20] As regards the adoptee, only a Hindu child can be

---

11. S. 13-A—added by the Marriage Laws (Amendment) Act, 1976.
12. S. 26.
13. For further details *see also* Bhattacharjee: *Modern Hindu Law and the Constitution*, pp. 150-154.
14. S. 6, Proviso, cl. (*b*).
15. *Ibid.*, *see* Bhattacharjee, pp. 154-156.
16. S. 7, Proviso.
17. S. 8(*c*). But see *Vijayalakshmamma* v. *B.T. Shankar*, (2001) 4 SCC 558: AIR 2001 SC 1424 (changed and modern concept of equality of women and their capabilities to decide independently is statutorily recognised. The authority or consent from the husband or the *sapindas* under the old Hindu law has now lost its relevance).
18. *Supra* note 9.
19. S. 9(2).
20. S. 9(3).

adopted — adoption of a non-Hindu child being void *ab initio*.[21] Right of adopting a son is denied to a person who has a Hindu son, grandson or great-grandson; but the existence of a non-Hindu son, grandson or great-grandson is no bar.[22] The same rule governs the provisions under which in the presence of a daughter or son's daughter, adoption of a daughter is not permitted.[23]

In the matter of maintenance, a non-Hindu wife cannot claim it from her Hindu husband (either while living with him or living separately)[24] — but, conversely, a Hindu wife enjoys the right to live separate from her non-Hindu husband, on the ground of his conversion, without losing her right to be maintained by him.[25] A widowed daughter-in-law must be maintained by her father-in-law, but not if she is a non-Hindu.[26] Children can claim maintenance from Hindu parents only; parents can claim it only from their Hindu children.[27] The law on "maintenance of dependants" (of deceased persons) applies only if the deceased was a Hindu.[28] By virtue of a reassuring statutory provision included in the Hindu Adoptions and Maintenance Act, every person legally entitled to maintenance from any Hindu relative loses that right on conversion to a non-Hindu religion.[29]

All this is, it must be noted, religion-based discrimination between person and person, created by Parliamentary legislation. There is another serious aspect of the matter that merits notice. If you are a Hindu, you can become a Sikh, Buddhist or Jain without being scared that your wife may seek divorce (or at least separate maintenance) from you, that your would be children shall lose their right to inherit directly from your parents after your death, that you would be deprived of your natural guardianship of your children, that your wife may give away your child in adoption against your wishes, and so on and so forth — but you cannot embrace Islam or Christianity without exposing yourself to these punitive consequences. This is the result of how the word "Hindu" is defined in the four Hindu-law enactments of 1955-56.[30] In other words, in all matters of family rights and relations the State openly discriminates between the four religions of undisputed indigenous origin and all the other faiths which it, impliedly, treats as foreign. In its sight, for instance, a Hindu mother on becoming a Sikh or Buddhist, remains the mother of her children, but not on embracing Islam or Christianity, so that

---

21. S. 10(*i*).
22. S. 11(*i*).
23. S. 11(*ii*).
24. S. 18(1) and (3).
25. S. 18(2)(*f*).
26. S. 19.
27. S. 20.
28. S. 22.
29. S. 24; for further details *see* Bhattacharjee, pp. 156-158.
30. Hindu Marriage Act, 1955, S. 2; Hindu Succession Act, 1956, S. 2; Hindu Minority and Guardianship Act, 1956, S. 3; and Hindu Adoptions and Maintenance Act, 1956, S. 2 — all saying that anybody who is not a Muslim, Christian, Parsi or Jew, is a Hindu.

only in the latter case she would lose her legal right to act as the natural guardian of her children or to veto her husband's decision to give away her child in adoption; and so on and so forth.

8. RELIGION-BASED DISCRIMINATION UNDER THE SECULAR LAWS ON MARRIAGE AND SUCCESSION

The religion-based discrimination under the four Hindu-law enactments of 1955-56 may appear just to those who find nothing wrong or unconstitutional in the disparity forged by law between Hinduism, Sikhism, Jainism and Buddhism on one hand and the remaining religions of India on the other. But that is not the end of the story. Religion-based discrimination, of the worst order, is found also in the so-called secular family law regime. The Special Marriage Act of 1954 — which is a national law and not meant for the followers of any particular religion — distinctly tilts towards the creeds of native origin, discriminating between their followers and those of all the other religions.

By virtue of an amendment made in the Act in 1976, on the recommendation of the then Law Commission, a Muslim, Christian, Parsi or Jew will, on contracting a civil marriage (whether inter-religious or not), lose (like before[31]) his or her personal law of succession and be thenceforth governed by the Indian Succession Act of 1925; but a Hindu, Buddhist, Jain or Sikh shall, on contracting a civil marriage, retain his or her personal law of succession, except when it is an inter-religious marriage.[32] And, of course, if a Hindu marries a Sikh (or Buddhist or Jain), or *vice versa*, in the eyes of the law it will not be an "inter-religious" marriage — that epithet would cover only the cases of a Hindu (or Sikh or Buddhist or Jain) marrying a Muslim, Christian, Parsi or Jew.[33]

It is indeed surprising how the palpably unconstitutional nature of this provision escaped the judicial acumen and the secular temper of the great P.B. Gajendragadkar who then headed the Law Commission. It was late Sri Hari Singh Gaur who had in 1922 secured an amendment in the former Special Marriage Act of 1872 in order to facilitate inter-religious marriages among Hindus, Buddhists, Jains and Sikhs without abdication of religion.[34] At the same time, Muhammad Ali Jinnah had fervently but unsuccessfully sought extension of the new provision also to the followers of all other religions of India. However, neither Gaur nor Jinnah had dreamt of getting any disparity forged between various creeds prevailing in this country; as both favoured invariable application of the civil law of succession (then contained in the Indian

---

31. Special Marriage Act, 1954, S. 21.
32. *Ibid.*, S. 21-A — *inserted* by the Marriage Laws (Amendment) Act, 1976.
33. *Ibid.*
34. [First] Special Marriage Act, 1872—as modified in 1922.

Succession Act, 1865) to all cases of civil marriages.[35] It was left to Parliament functioning under the secular Constitution of independent India to forge such an inter-religious disparity under the new version of that law enacted more than half a century later.

9. SEX-BASED DISCRIMINATION

As regards sex-based discrimination, there is no dearth of it either in the modern Hindu Code of 1955-56 or in the so-called secular legal regime of 1954. Some instances follow.

The *Hindu Marriage Act of 1955* would allow the marriage of a girl at the age of eighteen but not that of a man for another three years.[36] As regards its law of divorce, sexual perversion and option of puberty are furnished by the Hindu Marriage Act as grounds for divorce only to the wives, baselessly treating perversion and bestiality as men's monopoly and child marriage as that of women.[37]

The *Hindu Succession Act* prescribes different schemes of intestate succession for male[38] and female[39] intestates, providing further obnoxious variations for the latter depending on the source of acquisition of property.[40] By placing the mother in Class I and the father in Class II categories of heirs[41], it makes a pro-female discrimination between the parent's rights in their son's property. It totally derecognises the fraternal relationship, with the intestate, of his uterine brothers and sisters as against his brothers and sisters by "full" and "half" blood.[42] Failing all Class I and Class II heirs the remotest agnates (those related to the propositus wholly through males)[43] would, under its provisions, exclude even the nearest cognates[44] (those related to the propositus not wholly through males).[45] To the female heirs of Class I it does give shares in the family dwelling-house, but at the same time denies them the right to claim partition which it gives exclusively to their male co-heirs.[46]

The *Hindu Minority and Guardianship Act, 1956* does not allow a mother to act as her children's natural guardian unless their father is dead or otherwise

---

35. *See*, generally, my book *Civil Marriage Law of India: Perspectives and Prospects* (Bombay, 1978).
36. S. 5(*iii*). *See also* Lecture III, *infra*.
37. S. 13(2), clauses (*i*) and (*iv*). *See also* Lecture III, *infra*.
38. Ss. 8-13 and the Schedule.
39. Ss. 15-16.
40. S. 15.
41. The Schedule.
42. *Ibid.*, Explanation.
43. S. 3(*a*).
44. S. 8, clauses (*c*) and (*d*).
45. S. 3(*c*).
46. S. 23.

disqualified.[47] Under the Hindu Adoptions and Maintenance Act, 1956 a natural mother would not be allowed to give her child in adoption unless the father is dead or otherwise disqualified.[48] The same Act enforces only the wife's right to claim maintenance from her husband,[49] making no room for the reverse process in any circumstances whatsoever. Agreeing with this Act, and deviating from the parallel provision of the Hindu Marriage Act, the Special Marriage Act of 1954 allows only a divorced wife to claim maintenance from her husband, and not *vice versa* in any case.[50] It is indeed irrational that while Hindu law, the classical version of which always obligated only the husbands with their wives' maintenance, could under its modern form, make room for reversing the gear of that obligation, the secular marriage law should keep its door closed for such remedy.

The *Indian Succession Act of 1925*, appendixed to the law of civil marriages, forces on the wife her husband's domicile[51], but never allows a position *vice versa*. In respect of inheritance under a provision diametrically opposed to that under the Hindu Succession Act (under which mother excludes father)[52], this Act would not allow a mother to inherit her children's property if their father is alive.[53] Sex-based discrimination is found in the Child Marriage Restraint Act, 1929 (as modified in 1978) and the maintenance law under the Criminal Procedure Code, 1973.

Not each of the aforestated laws can be claimed to be "special law for women" which the State is enabled to make under the Constitution.[54] Many of these are, clearly, anti-women and not pro-women. What is, then, the meaning of "special" laws — laws for the welfare of women or also all those subjecting them to the dominance of man? Nobody seems to have an answer.

10. WHERE ALL THIS LEADS TO

Article 44 of the Constitution speaks of a uniform Civil Code but we have allowed diversities to grow. There are inter-territorial diversities[55], group diversities[56] and custom-based diversities.[57] These are very wide and variform. Despite Dr Ambedkar's call for "uniformity in civil laws", these diversities have

---

47. S. 6. The constitutional validity of this discriminatory provision is currently under challenge before the Supreme Court. Now in *Githa Hariharan* v. *Reserve Bank of India*, (1999) 2 SCC 228: AIR 1999 SC 1149 this point is explained fully.
48. S. 9(2) & (3).
49. S. 18.
50. Ss. 36-37.
51. S. 16.
52. Compare Class I with Class II, Entry I, in the Schedule, read with S. 8.
53. Ss. 42-43.
54. Art. 15(3).
55. T. Mahmood: *Personal Laws in Crisis*, (1986), pp. 31-38.
56. *Id.* at pp. 39-40.
57. *Id.* at pp. 40-42.

not died out. On the contrary they have secured recognition rendering the concluding words of Article 44 "throughout the territory of India" meaningless and ineffective.[58]

I have given above only an illustrative account of how the personal law enactments in modern India do discriminate between citizens on the basis of religion and sex. I would especially present this account to those who claim that traditional personal laws are not supra-fundamental rights, but merely wink on the discriminatory provisions with which our statutory personal laws are over-flowing. They must realise that it does not lie in their mouth to demand that any of the classical personal laws should be put on the touchstone of Part III of the Constitution in order to scrap those few of their discriminatory provisions the basis of which is even not exclusively religion or sex. Straining out a gnat and swallowing a camel cannot, they must understand, be sound policy.

11. POSSIBLE SOLUTION[59]

Removal of inter-territorial, sectarian and custom-based diversities within each of the personal laws is a *sine qua non* for achieving the constitutional idea of "uniformity" in civil laws.[60] Courts and rulers have a great responsibility upon their shoulders to solve this self-manufactured puzzle.

However, the year 2004[61] has witnessed some laudable judgments which reflect the court's concern to impart meaningful rather than technical justice and also ensure that no tricks are played to defeat the cause of the deserving party.[62] In *S.S. Bindra*[63] it was emphasised that the maintenance orders cannot be "*pegged to the date of separation*". Similarly in another case[64] the court enlarged the concept of joint property presented "*at or about the time of marriage*" to include exclusive properties of the spouses provided the same were presented at or about the time of marriage. In *Siddaramappa case*,[65] an alleged adoption by a male without his wife's consent was invalidated. In

---

58. *Id.* at p. 43.
59. *Id.* at p. 47.
60. Interested students may go through these two books which are thought-provoking. *See* note in the beginning.
61. XL ASIL 2004, pp. 257-285 at p. 285: Survey of 2004 cases by former Research Professor Dr. Kusum of the Indian Law Institute, New Delhi.
62. *Popri Bai* v. *Treeth Singh*, AIR 2004 Raj 129 (the husband played tricks against the wife. The wife had filed an application for interim maintenance. The court saw through it and granted maintenance from the date of her application.)
63. *S.S. Bindra* v. *Tarvinder Kaur*, AIR 2004 Del 442. (If there is a substantial increase in the income of the non-applicant after the filing of the petition by the claimant, the court is free to award even a sum higher than claimed by the applicant.)
64. *Hemant Kumar Agrahari* v. *Lakshmi Devi*, AIR 2004 All 126. (The wife may even claim her *Stridhana* under S. 27 of the Act.)
65. *Siddaramappa* v. *Gouravva*, AIR 2004 Kant 230. (Adoption without wife's consent was defeated by the courts.)

Kamal Basu Mazumdar case[66] and *R. Deivanai Ammal case*[67] attempts by male heirs to defeat the daughter's right to a share in the dwelling-house left by the deceased father were frustrated by the court. The court construed the *right of maintenance as an integral part of the right to life*,[68] which indeed is logical. The court however, ruled that even if the parties in a consent divorce decree compromise on the aspect of maintenance and the wife categorically and explicitly states in the petition that "she will not claim any maintenance or alimony in future from the husband" the wife is nonetheless free to open the matter and claim maintenance at a later stage. This view, it is submitted, has the potential of discouraging mutual settlement of issues and consent divorces since consent agreements are a package where parties agree to barter certain rights and claims to buy peace. If the terms and conditions are fair and reasonable, the courts should honour such agreements and discourage retraction.[69] Registration of every marriage irrespective of caste, seems to be the most powerful instrument to put a check upon a number of evils.[70]

Another remedy to root out these evils is to prepare and implement a uniform Civil Code.[71] Women in India under Hindu, Muslim and Christian laws continue to suffer discrimination and inequalities in the matters of marriage, succession, divorce and inheritance. So as a step forward towards a gender just code, the present laws of various communities in India need a closer look and reform, not only in compliance with the Indian Constitution but also as per the provisions of the International Law.[72] As observed "In fact, the Indian Government seems to have chosen to ignore these principles completely and acts as if they did not exist."[73]

The idea of Uniform Civil Code was raised in the Constituent Assembly in 1947.[74] India's Judiciary has made some efforts in this direction and these

---

66. *Kamal Basu Mazumdar* v. *Usha Bhadra Chawdhury*, AIR 2004 Cal 185.
67. *R. Deivanai Ammal* v. *G. Meenakshi Ammal*, AIR 2004 Mad 529.
68. *Geeta Satish Gokarna* v. *Satish Shankarrao Gokarna*, AIR 2004 Bom 345.
69. XL ASIL 2004, p. 285.
70. See Chapter on Marriage, para 12.
71. India is a signatory to the international covenant on Civil and Political Rights, 1966, and International Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), 1979. India is therefore bound to enforce the relevant provisions and ensure gender equality under national laws.
72. *See* Jyoti Rattan: *Uniform Civil Code in India: A Bombay Obligation under International and Domestic Law*, 46 JILI (2004) 577-587.
73. Kirti Singh: *Obstacles to Women's Rights in India* in Rebecca J. Cook (ed). Human Rights of Women: *National and International Perspectives* 375 (1994) cited in 46 JILI (2004) at p. 579.
74. B. Shiva Rao (ed.), The Framing of India's Constitution: Select Document, Vol. II, the Indian Institute of Public Administration (IIPA), New Delhi, 1968, Debates of 14, 17-20 April, 1947.

efforts continue.[75] It is the responsibility of the Government and it should fulfil it.

---

75. The following cases may be cited in support of the statement:
   (*a*) *Mohd. Ahmed Khan* v. *Shah Bano Begum*, (1985) 2 SCC 556.
   (*b*) *Sarla Mudgal* v. *Union of India*, (1995) 3 SCC 635: AIR 1995 SC 1531.
   (*c*) *Ahmedabad Women Action Group (AWAG)* v. *Union of India*, (1997) 3 SCC 573: AIR 1997 SC 3614.
   (*d* *Lilly Thomas* v. *Union of India*, (2000) 6 SCC 224: AIR 2000 SC 1650.
   (*e*) *Pannalal Bansilal Pitti* v. *State of A.P.*, (1996) 2 SCC 498: AIR 1996 SC 1023.
   (*f*) *Danial Latifi* v. *Union of India*, (2001) 7 SCC 740.
   (*g*) *Vishakha* v. *State of Rajasthan*, (1997) 6 SCC 241.
   (*h*) *Swapana Ghosh* v. *Sadananda Ghosh*, AIR 1989 Cal 1.
   (*i*) *Ammini E.J.* v. *Union of India*, AIR 1995 Ker 252.
   (*j*) *Pragati Verghese* v. *Cyril George Verghese*, AIR 1997 Bom 349.
   (*k*) *John Vallamattom* v. *Union of India*, (2003) 5 Scale 384.
   (*l*) Articles, Books etc. (*i*) UNO'S Report of the Committee on the CEDAW, 1979; (*ii*) Kirti Singh: *Obstacles to Women's Rights in India*, Rebecca J. Cook (ed.); (*iii*) Human Rights of Women, "*National & International Perspectives*", (1994); (*iv*) V.N. Shukla: *The Constitution of India*, (2001); (*v*) F. Agnes: *Hindu Men, Monogamy and Uniform Civil Code*, xxx (50); (*vi*) Economic and Political Weekly, 32 (1995); (*vii*) B. Karat: *Uniformity* v. *Equality*, (*viii*) Frontline 17 November, 1995; (*ix*) B. Shiva Rao (ed) The Framing of India's Constitution: Select Documents, Vol. II (IIPA), New Delhi, 1968, (*x*) Virendra Kumar: *Towards a Uniform Civil Code: Judicial Vicissitudes* (from Sarla Mudgal (1995) to Lily Thomas (2000)", 42 JILI 315 (2000); (*xi*) Anita Dhanda & Archana Parashar: *Engendering Laws: Essays in honour of Lotika Sarkar*, (1999), p. 137 ; (*xii*) Rajeev Dhavan: *The Apex Court and Personal Law*, The Hindu, 14 March, 1997; (*xiii*) S.P. Sathe: *From Shah Bano to Danial Latifi*, The Lawyers Collective, Vol. 17 at 9 (Jan 2002); (*xiv*) Satyabrata Rai Chowdhuri: *A Common Civil Code: It is a Constitutional Obligation*, The Tribune, 30 July, 2003 at 10; (*xv*) P.P. Rao: *Uniform Civil Code is a necessity: An Optional Common Law can be enacted*, The Tribune, 6 Aug, 2003 at 10. [From 46 JILI (2004) 577-587].

Appendix

Some selected stanzas and quatrains of Sanskrit exposing and explaining the real nature, aspirations and goal of a Hindu and Hinduism as mentioned in the four *Vedas* and various *Upanishads* etc.[1]

1. एकं सद् विप्राः बहुधा वदन्ति। (*Rgveda* 1.164.46)	God is one only. However, learned persons pray him in different names.
2. हिरण्यगर्भः समवर्तताग्रे। (*Rgveda* 10.121.1)	(In the beginning) God was first of all.
3. एको विश्वस्य भुवनस्य राजा। (*Rgveda* 6.36.4)	God is the master of all the worlds.
4. द्यावापृथिवी विभर्ति। (*Rgveda* 10.31.8)	God holds both, *Swarg* and earth.
5. तमेव विदित्वाति मृत्युमेति। (*Yajurveda* 31.19)	A person crosses over death by obtaining knowledge about God.
6. ऋतस्य पथा प्रेत। (*Yajurveda* 7.45)	Follow the path of Truth.
7. तन्मे मनः शिवसंकल्पमस्तु। (*Yajurveda* 36)	Let my mind be full of determination conducive to well-being.
8. य इत् तद्विदुस्ते अमृतत्वमानशुः। (*Atharvaveda* 9-10.1)	He who has known God, wins *moksha*.
9. कृतं मे दक्षिणी हस्ते जयो मे सत्य आहितः। (*Atharvaveda* 7.52.8)	In my right hand is diligence and industry and in left hand, victory.
10. माता भूमिः पुत्रो अहं पृथिव्याः। (*Atharvaveda* 12-1-12)	Earth is my mother, I am the son of earth.
11. शतहस्त समाहर सहस्रहस्त सं किर। (*Atharvaveda* 3-24-5)	Get by hundred hands; distribute by thousand hands.
12. मा जीवेभ्यः प्रमदः। (*Atharvaveda* 8-1-7)	Do not neglect animals.

1. Sanskrit Subhashit Manjari by *Dr. Dhanaraj* v. *Pandit*, Edn. 2004 Publisher: Sanskrit Sahitya Academy, Gandhinagar, (Gujarat).

13. असतो मा सद् गमय, तमसो मा ज्योतिर्गमय, मृत्योर्मा अमृतं गमय।

Oh God! lead me to truth from untruth, from darkness to light and to nectar from death.

(*Brihadaranyaka Upanishad*)

14. सत्यं वद, धर्मं चर, स्वाध्यायान्मा प्रमदः। आचार्याय प्रियं धनमाहृत्य प्रजातन्तुं मा व्यवच्छेत्सीः।।

(*Taitariyopanishada*, 1-11,11 अनुवाक्)

While entering गृहस्थाश्रम (second stage of life) by the disciple, his master says to him that—

"Speak the truth, lead your life according to Dharma and morally sound conduct, do not be idle or lethargic in studying good books and in obtaining knowledge.

15. मातृदेवो भव, पितृदेवो भव, आचार्यदेवो भव, अतिथि देवो भव।

(*Taitariyopanishada*, 1-11-11)

Respect your mother as Goddess, your father as God, your spiritual teacher as God and the guest as God.

16. ईशावास्यमिदं सर्वं यत् किञ्च जगत्यां जगत। तेन त्यक्तेन भुञ्जीथाः मा गृधः कस्यस्विद् धनम्।।

(*Ishavasyopanishada*)

God pervades in all inanimate and animate objects; he is in everything. Therefore, enjoy things after offering them to God. Do not aspire for more.

(*Ishavasyo*-2)

17. कुर्वन्नेवेह कर्माणि जिजीविषेत् शतं समाः। एवं त्वयि नान्यथेतोऽस्ति न कर्म लिप्यते नरे।।

(*Ishavasyopanishada*-2)

A person should desire to live for hundred years while pursuing his activities and surrendering or dedicating it to God. Acts and activities pursued by men with an innate disposition of mind to abdicate its result, do not involve him in confinement to repeated birth as the consequence of his religious acts, good or bad (by which the soul is attached to worldly pleasures etc.)

18. भिद्यते हृदयग्रन्थिं छिद्यन्ते सर्वसंशयाः। क्षीयन्ते चास्य कर्माणि तस्मिन् दृष्टे परावरे।।

(*Mundakopanishad*- 2.8)

After knowing the worldly life and its activities and God, who is aloof of all these things, all the confusions of a person in his heart are removed; all his doubts are dismissed and all the confinements and attachments to good or bad results of his acts are rendered baseless.

19. नायमात्मा प्रवचनेन लभ्यो न मेधया न बहुना श्रुतेन।
यमेवैष वृणुते तेन लभ्यः तस्यैष आत्मा विवृणुते तनुं स्वाम।।
(*Kathopanishad*)

This supreme animate spirit (*Ãtmã*) cannot be realised by giving discourse, by attending to such discourse, by intelligence or by study. *Atma* is earned or acquired by him, whom the supreme animate spirit chooses. This supreme spirit lays himself bare and uncovered before him of its own.

20. उत्तिष्ठत जाग्रत प्राप्य वरान् निबोधत।
क्षुरस्य धारा निशिता दुरत्यया दुर्गं पथस्तत् कवयो वदन्ति।।
(*Kathopanishad*)

Arise, awake, get the best spiritual teachers and acquire the excellent goal. As it is difficult to walk on a razor's sharp edge, so it is difficult to acquire the best goal — so say the learned. (In short — arise, awake and stop not till the goal is reached).

21. चरन् वै मधु विन्दति चरन् स्वादुमुदुम्बरम्।
सूर्यस्य पश्य श्रेमाणं यो न तन्द्रयते चरन्। चरैवेति।।
(*Aitareya Brahman*)

One who goes on gets nectar, one who is industrious gets sweet fruit. Look at the striving of the sun, he constantly goes on without indolence. Therefore go on, go on, go on.

22. आस्ते भग आसीनस्य ऊर्ध्वस्तिष्ठति तिष्ठतः।
शेते नियद्यमानस्य चराति चरतो भगः।।
(*Aitareya Brahman*)

The destiny of one who is inactive, remains inactive; of one who is standing tenaciously (against odds), stands in readiness; of one who lies down (idle), remains idle; but of one who goes on and is active all the time, remains active and bears fruits.

23. हिरण्यमयेन पात्रेण सत्यस्यापिहितं मुखम्।
तत् त्वं पुषन् अपावृणु सत्य-धर्माय दृष्टये।।
(*Ishavasyopanisha*, 15)

This physical world is like a golden pot wherein the truth is covered. It is the Atma or Brahma. O God! open the lid of the pot, I want to get the Atma-element or Brahma.

24. धृतिः क्षमा दमोऽस्तेयं शौचमिन्द्रिय निग्रहः।
धीर्विद्या सत्यमक्रोधः दशकं धर्मलक्षणम्।।
(*Manusmriti*)

Patience, forgiveness, tranquility, not stealing, holiness or purity, control over organs of senses, intelligence capable of understanding good or bad, education, truth and freedom from anger — these ten are the essentials of Dharma.

25. श्लोकार्धेन प्रवक्ष्यामि यदुक्तं ग्रंथ कोटिभिः।
परोपकारः पुण्याय पापाय परपीडनम्।।
(*Mahabharata*)

I am telling you this thing in half a stanza, what has been said in crores of volumes: righteousness exists in giving happiness to others, and it is sin to trouble others.

26. यथा धेनुसहस्रेषु वत्सो विन्दति मातरम्।
तथा पूर्वकृतं कर्म कर्तारमनुगच्छति।।
(*Mahabharata*)

As a calf finds out his mother from a thousand cows, so, acts committed in the previous birth, follow the doer find him out and give result.

SUBJECT INDEX

Adoption (Ch. XVIII)
- capacity and the right to take in, 431, 440
- capacity of a female Hindu to take in, 443
- characteristics of, 437
- conditions as to, 433
- doctrine of relation back, 450
- effect of, 448
- inter-country—adoptions, rules, 453
- kinds of, 452
- meaning, object and forms, 427
- objects of, 434
- persons capable of giving in, 432, 443
- persons who may be adopted, 432, 436
- presumption in favour of ancient adoptions, 457
- proof of, 452
- regulation of, 437
- result or effect of, 433
- right of adoptive parents to dispose of their properties, 455
- who is eligible for, 447

Adoption of a religious order
- a ground of exclusion, 240

Adultery, *see* "marriage"

Agnates and Cognates, 395

Alienation
- by gift, 68, 102
- by sale or mortgage, 68, 101
- by the father, 100, 120
- by the manager/karta, 98
- by the sole surviving coparcener, 101
- by the whole body of coparceners, 97
- by will, 68, 102
- for family business, 92
- limitation for setting aside, 107
- of coparcenary property, 87, 97
- right of impeachment of, 106
  - when lost, 107
- who can, 97
- who may object to, 105

Alienation of debutter property
- benefit of estate, 211

Alienation of debutter property (*contd.*)
- burden of proof, 212
- by Mahant, 211
- by Shebait, 211
- "in case of need", 211

Alienation of undivided coparcenary interest, 101
- by gift, 102
- by sale or mortgage, 101
- by will, 102
- in execution of decree, 102
- private alienation, 101, 102
- voluntary alienation, 101, 102

Alimony, 252
- considerations, 353, 355
- order of, 355
- payment of, 353
- permanent, 354

Allotment of shares on partition, 153
- general, 153
- rules, 154-156

Ancestral business, 76
- different from ordinary partnership, 76

Ancestral property, 69
- classification, 70
- concept of, under Dayabhaga law, 109
- father's and son's interest in, 72
- father's special power of disposition, 72
- meaning, 69
- sources of, 70

Annulment of marriage, *see* "marriage"

Antecedent debt
- meaning, 121

Apastambha Sutra, 18
- forerunner of time, 25

Applicability of Hindu Law, 19

Avyavaharika or immoral debt, 122
- instances, 122, 123

Becoming sanyasi *see* "adoption of a religious order"

Benami Transactions, 178
- causes of origin, 179

Benami Transactions (*contd.*)
characteristics, 179
definition, 178
meaning, 178
position up to 18-5-1988, 180
benamidar's right to sue, 181
considerations to decide, 180
decree against benamidar, 181
doctrine of advancement, 180-182
onus of proof, 180
title of the true owner: when recognised, 180
when real title is not given effect to, 181

Benami Transactions (Prohibition) Act, 1988
its effect, 182
past benami transactions, 182
position from 19-5-1988, 182
presumption of advancement, 182
such transaction, an offence, 182-
suit by real owner prohibited, 182
suit for specific performance does not lie, 182

Benefit of Estate, 211

Bestiality, *see* "marriage"

Bigamy, *see* "marriage"

Blood relation and religious efficacy, 232

Brihaspati Smriti, *see* "smriti"

Caste system, 8

Change of religion, a ground of exclusion, 239

Characteristics of Hinduism, 16

Charitable endowments, *see* "religious and charitable endowments"

Civil death, 240

Codification
first step to, 45
religion-oriented personal laws, 46
the four Acts, 46

Commentaries and Digests, 21, 27
importance of, 29
main commentaries, 28
schools of law, 27

Congenital lunacy or idiocy, 238
now no disqualification, 238

Consent, 335
divorce by, 335
withdrawal of, 336

Consent by force or fraud, 293

Construction of wills, 193
consideration of "other matters", 194
duty of court, 194

Consummation, 290

Conversion, *see* "marriage"

Coparcenary, *see* "Hindu Coparcenary"

Coparcenary property
presumptions as to, 61
acquisition of separate property by a member, 63
continual jointness, 62
jointness in food, 61
nucleus of joint family, 62
partition, 62
possession of property, 62
two categories, 60
under Dayabhaga law, 108

Coparcenary rights to women in property recommended, 57

Coparceners
insolvency of, 104
meaning, 52, 53
purchaser from, 153
right of survivorship, 78, 81, 102
rights of, 80-83
test of, 55
who are, 53
who cannot become, 53

Cruelty, *see* "marriage"

Custody of children, 356
courts' power, 356
guiding principle, 357

Custom
a ground of exclusion from inheritance, 240
and usage, 37, 261
definition, 34
discontinuance of, 36

Custom (*contd.*)
essentials, 34
judicial notice of, 38
onus of proof of, 36
twilight of law, 34
types of, 37

Dancing girls, 223
succession to their property, 223

Dasiputra, 241, 243

Dayabhaga law, 108
ancestral property under, 109
concept of ancestral property, 109
coparcenary property under, 110
debts under, 127
enjoyment of property, 110
essence of coparcenary, 108
foundation of coparcenary, 108
members of coparcenary, 109
partition and accounts, 110
passing of property, 108
power of coparcener, 110
power of father, 109
presumption, 110
prevalence, 110
sons' interest, 109

Dayabhaga joint family, 108

Dayabhaga School, 39
difference from Mithila School, 40
prevails in, 40
what is, 39

Death of Hindu Joint Family, 57

Debts
a religious duty, 111
antecedent, 121
enforcement of liability after partition, 125
grounds of liability, 111
heir's liability, 112
illegal or immoral, 122
immoral or avyavaharika, 123
liability after partition, 113
liability before partition, 113
liability for coparcener's debts, 113
liability of a son, grandson, and great-grandson, 113
not immoral or avyavaharika, 124

Debts (*contd.*)
personal debts of father, 120
suretyship of father, son's liability, 125
time-barred, 122
under Dayabhaga law, 127-128
under Mitakshara law, 112-127

Debutter property, *see* "religious and charitable endowments"

Desertion, 322

Devasthanam and Math, 198
distinctions between, 198

Devolution of property, meaning, 230

Dharma
classification of, 7
common, 3
law, a branch of, 2
meaning of, 3
observance of, 4
rules of, 3
sources, 5
varnashram, 7
what is, 3

Dharmasashtras, *see* "Smriti"

Direction for accumulation, *see* "wills"

Discrimination
religion-based, 513, 516
sex-based, 517
unanswered questions, 512

Disqualification, 418
from inheritance: effect of, 240

Distinction
between Mitakshara and Dayabhaga Schools, 42
between Devasthanam and Math, 199
between divorce and judicial separation, 334
between gifts and wills, 189
between joint family property and impartible estate, 169
between joint tenancy of English law and Hindu coparcenary, 58
between obstructed and unobstructed heritage, 64
between ordinary partnership and Hindu joint family firm, 76

Distinction (*contd.*)
between partition and family arrangement, 135
between partition under Mitakshara and Dayabhaga Schools, 165-168
between public and private endowments, 197
between void and voidable marriages, 289
Divine origin, 1, 17
Division per capita, 234
Division per stirpes, 234
Divorce, *see* "marriage"
Doctrine
of blending, 66
of cy pres, 213
applies to, 213
basis, 213
meaning, 213
of factum valet, 46
of overlapping, 106
of pious obligation, 114
cause of action and limitation, 112
creditor's priority, 120
father's personal debts, 120
grandson's and great grandson's liability, 118
meaning, 114
nature of liability of sons, 118
origin and basis, 115
personal liability, 116
reasons for liability, 116
son's liability during father's lifetime, 118
subsistence of, 118
suit for enforcement of decree, 119
of relation back, 450
of representation, 233
limited application of, 233
Dowry (Prohibition) Act, 1961, 320
Duty of Court, 30, 484
Dwelling houses: provision for, 416
Endowments
burden of proof, 206
categories of, 204
Endowments (*contd.*)
creation of, 201
complete, 204
dedication of property, 203
types of, 203
essentials of, 202
illusory, 203
noteworthy points, 200
partial, 204
see "religious and charitable endowments"
En ventre sa mere, 231
Equity, Justice and Good Conscience
as a source of Hindu Law, 38
Escheat, 423
failure of heirs, 423
meaning, 423
scope and application, 423
Estate
absolute and limited, 232
impartible,
see "impartible estate"
Exclusion from inheritance
a rule of pure Hindu law, 236
eight grounds of, 236-240
law from 1956, 240
law prior to 1956, 236
stands modified now, 236
Exclusion from partition, 240
Factum valet, 46
Family arrangement, 133
definition, 133
difference with partition, 135
requisites of, 134
Father
his right to alienate coparcenary property: nature of, 120
his special power to effect partition, 145
kinds of liability, 125
son's liability for, 125
special power of disposition of ancestral property, 72
suretyship of, 125

Founder of religious or charitable trust, 212
his rights, 212
who is, 212
Four Acts
against basic structure, 46
general observations of, 254
religion-oriented, 46
Fresh stock of descent, 232
a female can now become, 232
Full blood and half blood, 262
Full ownership, meaning of, 225
General laws regarding maintenance, 481
Criminal Procedure Code, 486
conditions for granting maintenance, 489
from whom can be claimed, 489
maintenance proceedings, 486
order, 490
procedure, 490
who can claim, 487
who has jurisdiction, 489
Divorce Act, 1869, 491
Family Courts' Act, 1984, 481
Bombay H.C's view, 484
components of auxiliary service, 485
concept, purpose and status, 482
constitution, 483
duty of court, 484
evidence and decree, 486
general, 481
jurisdiction, 484
miscellaneous, 486
procedure, 484
undesirability of lawyers' interference, 484
Special Marriage Act, 1954, 491
Gifts, 183
capacity of the donee to acquire, 186
capacity to gift, 185
definition, 183
delivery of property, necessity of, 184
deposit in the name of wife or child, 187
Gifts (*contd.*)
distinguished from wills, 189
donation mortis causa, 187
gift of money, 185
in fraud of creditors, 187
Indian Trusts Act, 1882, 187
proof, 188
reserving the usufruct, 187
revocation of, 188
subject-matter of, 184
three ways of, 183
to unborn persons, 186
Transfer of Property Act, 1882, 183
trusts, 187
what properties may be disposed of by, 184
when complete, 184
with restraining conditions, 187
Grounds of exclusion from inheritance, 236
prior to Hindu Succession Act, 1956, 236
Guardian, 494
appointed by court, 505
de facto guardian, 404
duties, rights, powers and liabilities of, 509
minor's incompetency for, 504
natural guardian, 495
powers of a natural guardian, 499
powers of a testamentary guardian, 502
Guardianship, 242
Gurwat Custom, *see* "custom"
Hindu
arya samajists, 12
by birth, 10
by religion, 11
converts, 12
coparcenary, 52
definition, 9
divisions, 11
effect of conversion, 13
is born, not made, 10
jurisprudence, 19
law, 1
mahanubhava panth, 12

Hindu (*contd.*)
meaning, 9
religion, 9
who is, 9

Hindu Adoptions and Maintenance Act, 1956, 429
applicability of, 465
changes brought about, 431, 464
definitions, 429, 465
maintenance, 434, 459, 462
alteration in, 479
amount of, 474
award of, to dependent, 475
claimant to be Hindu, 477
debts to have priority, 480
effect of transfer of property, 481
Family Courts' Act, 1984, 481
general laws regarding, 481
kinds of liability, 466
meaning and sources, 434, 462
of children and aged parents, 471
of dependents, 472
of widowed daughter in-law, 469
of wife, 466
prior law, as to, 463
right not transferable, 481
rules in Pokuru case, 473
to be a charge, 480
who can claim, 487
overriding effect, 430
Section 3, 429, 465
Section 4, 430
Sections 5 to 11, 435
Section 12, 448
Sections 13, 14, 455
Sections 15-17, 456
Sections 18-28, 459-462
Sections 29-30, 456

Hindu Coparcenary
different from joint tenancy of English Law, 58
essentials of, 54, 56
features of, 52, 56
formation of, 53
illustration, 53

Hindu Coparcenary (*contd.*)
its members, 53
meaning, 53
notable features of, 56
rights to women, 57
within coparcenary, 55

Hindu law
a branch of Dharma, 2
and the Constitution, 510
applicability of, 19
broad divisions, 3
comparison with Muslim law, 26
consists of, 2
description, 2
divine origin, 1, 17
effect of British rule, 3
enactments modifying etc., 31
how far applicable, 19
law and, 1
not result of legislation, 1
origin of, 17
persons governed by, 44
roots of, 18
schools of, 39
since independence, 3
uncodified topics of, 3

Hindu Marriage Act, 1955
application, 257
definitions, 261
divorce, 294
alternative relief in, 335
by mutual consent, 294, 335
petition, 336
registration, 273, 275
restitution of conjugal rights, 277
Sections 1, 2, 3, 255
Sections 5-8, 265
Sections 9, 10, 276
Sections 11-18, 283-285

Hindu Minority and Guardianship Act, 1956, 492
application, 493
definitions, 494
general, 492
guardian, 494, 495
main changes brought about by, 495
minor's custody, 507

Hindu Minority and Guardianship Act, 1956 (*contd.*)
minor's incompetency to act as, 504
minor's welfare, 506
overriding effect of the Act, 494
Section 4, 494
Section 5, 494
Sections 6, 7, 495
Section 8, 499
Section 9, 502
Section 10, 504
Sections 11, 12, 504, 505
Section 13, 506

Hindu Religion
and Jainism, 15
characteristics of, 15
distinguishing feature, 15

Hindu Succession Act, 1956
absolute property of a female Hindu, 398
application, 374, 378, 387
brief history, 371
changes effected, 368
classification of heirs, 388
computation of degrees, 396
definitions, 374
devolution of interest in coparcenary property, 379
devolution of interest in property of a Tarwad, Tawazhi, etc., 382
disease, defect, etc. not to disqualify, 422
distribution of property among agnates and cognates, 395
distribution of property among Class I heirs, 393
distribution of property among Class II heirs, 395
disqualification and escheat, 418
dwelling houses, 416
effect on partition, 143
failure of heirs, 423
general provisions relating to, 411
general rules of succession (females), 405
general rules of succession (males), 386
intestate succession, 375

Hindu Succession Act, 1956 (*contd.*)
introductory, 367
notable features, 368
object and scope of, 371
order of succession among heirs in the Schedule, 392
order of succession and manner of distribution among heirs of a female Hindu, 408
overriding effect of, 375
position of woman's estate
after the Act, 227
before the Act, 224
power to make a will, 424
repeal, 425
Schedule, 425
Sections 2, 3, 4, 372-374
Sections 5, 6, 7, 17, 375
Sections 8 to 13, 19, 386
Sections 14-16, 397
Sections 18- 23, 411
Sections 24- 28 & 29, 418
Sections 30, 31, 424
status of the disqualified person, 421
testamentary succession, 424
title, extent and commencement, 372

Hindu Undivided Family (HUF), *see* "joint family"

Hinduism, 14
belief of, 14
characteristics of, 16
meaning, 14

Illegitimacy, once a ground of exclusion, 237

Illegitimate children
and guardianship, 242
and inheritance, 243
joint family property, 242
law as to, 241
partition, 242
position after 1956, 241
position before 1956, 241

Impartible estates, 169
a creature of custom, 170
abolition of, 231
application of Hindu Succession Act, 1956, 173

Impartible estates (*contd.*)
differs from joint family property, 169
incidents of impartible estates, 170
accretions, 172
debts, 172
held by one person, 170
income and its accumulation, 171
maintenance, 172
right of alienation, 171
rule of primogeniture, 171
whether coparcenary or joint family property, 171
instances of, 169
meaning, 169
origination, 170
succession to, 172
under Dayabhaga law, 173
Impotency, 290
consummation and, 290
Incidents of impartible estates, *see* "impartible estates"
Inheritance
conditions for devolution of property, 229
exclusion from, 236
foundation of the rules of inheritance, 230
general principles of succession, 231
a spes successionis, 231
absolute estate and limited estate, 232
agreement cannot change it, 231
blood relation and religious efficacy, 232
cannot remain in suspense, 231
division per stripes and per capita, 234
doctrine of representation, 233
fresh stock of descent, 232
tenants-in-common and joint tenants, 234
whole blood preferred to half-blood, 232
property passing by succession, 230
under Dayabhaga Law, 229
under Mitakshara Law, 229
Insanity, *see* "marriage"
Insolvency
effect of, 104
of a coparcenar, 104
of father, 105
of manager, 104, 105
of minor, 105
of other coparceners, 105
Joint family (Dayabhaga Law), 108
Joint family (Mitakshara Law)
a unit, 52
composition of, 51
death of, 57
enjoyment of property, 52
essential features of, 52
its members, who are, 51
karta of, 52
nature, 49-50
not a juristic person, 50, 52
presumption of law, 50
property of, divisions, 65
rights of HUF members, 51-52
what is it, 51
Joint family business, *see* "ancestral business"
Joint family firm, *see* "ancestral business"
Joint family property
accretions to, 65
acquired by all, 65
ancestral property, 65
and partition, 242
divisions, 65
thrown into common stock, 66
Joint property
incidents of, 67
summary, 68
Judicial decisions, 21, 30
a place of pride, 30
duty of courts, 30
role of courts, 30
Judicial separation, 281
grounds for, 282
Karta, *see* "joint family"
Law (or Dharma)
a branch of Dharma, 18
Dayabhaga, 108

Law (or Dharma) (*contd.*)
Mitakshara, 49
place of, 18
rule of, 18
sources of, 21
theory of, 18

Law as to illegitimate children, *see* "illegitimate children"

Law Commission, 174th report, 57

Legal necessity, 88

Legal system, ancient jurisprudence, 1

Legislation, 22, 31
enactments modifying etc. Hindu Law, 31-33

Liability of manager, 95
not to alienate, 96
not to start a new business, 96
to render accounts, 95
to recover debts, 96
to spend reasonably, 96

Life estate *see* "woman's estate"

Life tenant *see* "woman's estate"

Limitation, 213

Limited ownership *see* "woman's estate"

Mahant
devolution of office, 210
meaning, 208
obligations and duties, 208
occupies a fiduciary position, 209
offering to, 209
only one mahant, 209
position of, 208
powers of, 208
property is his possession: presumption, 209
removal of, 210
spending by, 211

Mahantship
a genuine legal right, 209
a suit for possession, 213
appointment to, 210
not heritable, 209
succession to, 210

Maintenance, *see* "Hindu Adoptions and Maintenance Act, 1956"

Manager (Karta), 85
benefit of estate, 90
illustrations, 89
business by, 78
his liability, 95
implied authority of, 87
legal necessity, 88
illustrations, 89
position of, 86
powers of, 87
powers of alienation for family business, 92
who can be, 85
who is, 85

Manusmriti, *see* "smriti"

Marriage
adultery, 299
alimony, 352
alternative relief, 335
annulment of, 289
appeals, orders etc., 359
bigamy, 331
ceremonies for, 248, 272
changes affected by HMA, 1955, 251
consent by fraud or force, 293
consummation of, 290
conversion, 327
cruelty, 304
Declaration of nullity, 286
decree and relief, 349
desertion, 322
desirable guiding principles, 351
disposal of property, 358
divorce, 294, 335, 337, 338
summary of grounds, 298
dowry, 320-322
forms, 247
Hindu marriage, conditions for, 266-271
impotence, 290
incursions made by culture etc., 248
innovation of new ceremonies, 272
insanity, 328
irretrievable breakdown of, 337
judicial separation, 276, 281, 334
jurisdiction and procedure, 346
legislation prior to 1955, 249

Marriage (*contd.*)
leprosy, 329
maintenance decreed to wife, 333
monogamy, 267
non-restitution of conjugal rights, 331
nullity of, 283
offences relating to, 362
overriding effect of HMA, 1955, 252
petition, 341
pregnancy of bride, 293
presumption of legitimacy of child, 273
rape, sodomy and bestiality, 332
registration of, 273
renouncing world, 330
repudiation of, by wife, 333
restitution of conjugal rights, 277
Sections 9,10, 276
Sections 11-18, 283
Sections 19-28-A, 342
Section 29, 359
Section 30, 360
summary, 249
the concept, 246
unheard of for seven years, 330
unsoundness of mind, 292
veneral disease, 329
void marriages, 285
voidable marriages, 289

Marumakkattayam and Aliyasantan Laws, 383

Material sources of Hindu Law, 21
see also, "sources"

Migration, its effect, 45

Minority and guardianship, *see* Chapter XX

Mitakshara Law
composition, 51
coparcenary property, 59
essential features, 52, 54
Hindu coparcenary, 52
joint tenancy, 58
manager, 85
nature, 49
obstructed and unobstructed heritage, 64
property: classification, 64

Mitakshara School, 39
authority of works, 41
different from Dayabhaga School of Law, 42
prevails in, 40
sub-school of, 40
what is, 39
works supplementing, 40

Modern Hindu Law and Constitution, 510
issues, 511
opinions, 511
questions unanswered, 512
religion based discrimination, 513, 516
sex based discrimination, 517

Murder
a ground of exclusion, 238

Murderer, 419

Narada Smriti, *see* "smriti"

Natural, physical or mental defects
once a ground of exclusion, 238

Notable cases
Bhagabati Prasad case, 159
Devani v. Chindavaram, 273
Dharma Shamrao Agalawe case, 451
Girdhari Lal case, 120
Githa Hariharan case, 497
Hari v. Ganapatrao, 158
Hiranand S. Managaonkar case, 282
Kamta Devi, 273
K.T. Prasad case, 160
Lily Thomas case, 364
Moro Vishvanath case, 54
Moti Vahu case, 193
Muthuswami case, 404
Sarla Mudgal case, 364
Shivaji Ganapati case, 107
Sawan Ram v. Kalawati, 451
Tagore v. Tagore, 193, 231
White v. White (H.LL.), 351
Yesudas case, 259

Notable features of Hindu coparcenary
a creature of law, 56
end of coparcenary, 56
incidents of, 57

Notable features of Hindu coparcenary (*contd.*)
mode of succession, 56
unity of juristic existence, 56
unity of ownership, 56
unity of possession, 56

Nullity of marriage, *see* "marriage"

Obstructed heritage, 64
different from unobstructed heritage, 64

Operation of Hindu Law, 21

Parashara Smriti, *see* "smriti"

Partial Partition, 157
a suit for, when maintained, 157
as regards persons, 159
as regards property, 158
effect of partial partition on remaining members, 159
basic principles, 159
exceptions to general rule, 157
principles thereof, 159, 160
general rule for, 157
presumptions as regards, 158
types of, 157

Partition
a matter of intention, 131, 132
agreement not to partition, validity of, 135
allotment of shares, 153
basic principles, 160
circumstances creating illusion of, 133
complete partition, 158
definition, 131
effect of, 163
effect of births and deaths, 147
effect of HSA, 1956, 143
exclusion from , 165
explanation, 131
how effected, 138-143
by agreement, 139
true test of, 139
by any other conduct, 143
by apostasy, 140
by arbitration, 140
by conduct, 139

Partition (*contd.*)
by institution of suit, 141
by marriage under Special Marriage Act, 141
by registered notice, 140
Raghavamma case, 140
by renunciation, 142
by sale, 142
by will, 140
oral, 141
partial partition, 157-160
persons entitled to a share, 148-153
property liable to, 136
provisions to be made on, 137
reopening of, 160
reunion, 164
sons born subsequently, 148
son's right to sue for, 147
special power of HUF to effect, 145
special power to effect, 145
suit, 145
summary, 168
two senses, 131
under Dayabhaga Law, 165
what is, 131
who can sue for, 144
who cannot sue for, 144

Partition suit, necessary parties, 145

Partition under Dayabhaga Law
difference from Mitakshara system, 165
summary, 168

Pious obligation, doctrine of, 114

Postscript, 510

Power of appointment, 193
definition, 193

Powers of manager, 87
of alienation of joint family property or coparcenary property, 87
of guardianship, 95
over income and expenditure, 94
to acknowledge debts, 93
to alienate for family business, 92
to compromise, 93
to contract, 92
to contract debts, 92

Powers of manager (*contd.*)
to give a valid discharge, 93
to refer to arbitration, 93
to represent joint family in suits, 94
to start new business, 92

Pregnancy of bride, 293

Presumption in cases of simultaneous deaths, 414

Primogeniture
application, 171
application of HS Act, 173
types of, 171

Prohibited relationship, 264
degrees of, 264
in marriage, 264

Property
acquired by all, 65
acquired by joint labour of members, 66
acquisition, 400
ancestral, 69
classification, 65
meaning, 400
of joint family, 65
passing by succession, 229
possession, 400
thrown into common stock, 66

Propinquity, meaning, 232

Public and private endowments
distinction between, 197

Puranas
a fifth veda, 25

Purchaser of undivided coparcenary interest
remedies of, 102
rights of, 102

Questions unanswered, 512

Recognised Sources of Hindu Law, 21
compared with Muslim Law, 26

Religious and Charitable endowments, 196
alienation of debutter property, 211
application of cy pres doctrine, 213
debutter property, 197

Religious and Charitable endowments (*contd.*)
limitation, 213
meaning, 196
public and private endowments distinction, 197
conversion of property, 198
intention, 198
transfer of endowments, 198
vesting of property, 198
two divisions, 197
what endowments are religious and charitable, 200

Religious and Charitable uses, 200
purposes under the
Charitable Endowments Act, 1890, 201
Transfer of Property Act, 1882, 201

Religious Institutions
meaning, 199
two types, 198

Remarriage, a ground of exclusion from inheritance, 237

Reopening of partition
once made cannot be reopened, 160
ten exceptions, 161-162

Restitution of Conjugal rights
see "Marriage"

Reunion, 164
conditions, 164
effect of, 164
meaning, 164

Rig Veda, 1

Right of shebaitship
a recognised form of property, 208
can be disposed of by a will, 208
is heritable, 207

Right of survivorship
explained, 81
when defeated, 81

Rights and remedies of purchaser of undivided coparcenary interest, 102

Rights of coparceners
against adverse possession, 83

Rights of coparceners (*contd.*)
community of interest, 80
joint possession and enjoyment, 80
of alienation, 81
of survivorship, 81
to account, 82
to enforce partition, 80
to maintenance and necessary expenses, 83
to make a will, 83
to make self-acquisitions, 82
to manage, 81
to renounce, 81
to restrain unauthorised acts, 82
to set aside alienations, 82
unity of possession, 80

Rights of the founder, 212

Rule of Damdupat, 175
a rule of equity and good sense, 175
application, 176
capitalization of interest, 175, 176
exception to the rule, 177
explanation, 175
meaning, 175
object, 175
purpose of the principle, 175
who can benefit from the rule, 176

Rule of primogeniture
see "primogeniture"

Rules of construction
Tagore v. Tagore, 193
wills, 193

Sapinda, 262
relationship, 262

Sapinda relationship, rules of, 263
under Mitakshara law, 232

Sapindaship
different interpretations, 232
meaning of 230, 232

Schools of Hindu Law, 39
see "commentaries and digests"
difference between, 42
kinds of, 39
meaning of, 39
nomenclature as, 39

Schools of Hindu Law (*contd.*)
operation of, 41
reasons for emerging, 31

Separate property, 67, 72
gains of learning, 75
how acquired, 72
incidents of, 67, 74
Parbati Koer case, 74

Shebait, 206
can file a suit, 207
delegation of authority by, 207
devolution of office, 207
duty of, 206
female shebait, 207
involves two things, 206
manager of properties, 206
servant, 206
meaning, 206
nomination of successor by will: a vexed question, 208
not a trustee, 207
number of shebaits, 207
offerings made to temple, 207
powers of, 206
removal of, 210
rights of, 207
succession to office of, 208

Smritis or Dharmashastras, 21, 23
contents of, 23
in case of conflict, 24
kinds of, 24
number of, 24
where texts differ, 25

Son, 407

Son's liability
enforcement of, 125
summary of, 126

Sons and daughters, 407

Sources of Hindu Law
ancient, 21
commentaries and digests, 27
comparison with Muslim Law, 26
custom, 33
equity, justice and good conscience, 38
judicial decisions, 30

Sources of Hindu Law (*contd.*)
legislation, 31
modern, 22
Smriti, 23
Shruti, 22
Spes Successionis, 231
Srutis or Vedas, 22
contents of, 22
number of, 22
vedas, 22
vedangas, 23
Stepson, 407
Stepsons and stepdaughters, 407
Stridhana
classification, 215
commentators on, 215
definition by Yajnavalkya, 217
distinctive features of, 220
divisions of, 222
ayautaka, 223
gifts and bequests, 222
shulka, 222
yautaka, 223
explanation of, 218
her right on, 220
in general, 220
statutorily, 220
includes, 216
according to Devala, 217
according to Katyayana, 217
according to Manu, 216
according to smriti writers, 216
according to Yajnavalkya, 217
married woman, 221
meaning, 215
Mitakshara on, 217
Privy Council on, 217
salient features, 218
smriti writers on, 216
sources of, 218
succession to, 221
according to Dayabhaga, 222
according to Mayukh, 222
test of, 216
unmarried woman, 221
Succession, *see* **Hindu Succession Act, 1956**
Succession to property of dancing girls, 223
Suretyship
kinds of, 125
of father, 125
Surrender of interest by a limited owner, 226
Sutras, 24
classes of, 25
Tenants-in-common and joint tenants, 234
Trading family, 76
Unchastity, once a ground of exclusion, 226, 422
Undivided coparcenary interest
rights and remedies of purchaser, 102
Unheard of for seven years, 330
Unobstructed heritage, 64
Unsoundness of mind, etc., 292
Upnishadas, *see* "Smritis"
Usage, *see* "Custom"
Uterine blood, 262
Uterine brother, 232
Vedas, *see* "Srutis"
Vedangas, *see* "Srutis"
Venereal disease, 329
Void marriage, 285
Voidable marriage, 289
Welfare of minor, 351, 506
Why Hindu Law is applied, 19
Widow's estate, *see* "Woman's Estate"
Widow's remarriage, 419
Wills
bequest to unborn persons, 192
capacity to make, 190
capacity to take, 190
construction of, 193
definition, 189
direction for accumulation, 193
duty of court, 194
estates unknown to HL, 192
in favour of female, 192
other matters, 194

Wills (*contd.*)
power of appointment, 193
probate and letters of administration, 192
testamentary power to make, 189
what may be bequeathed, 190
Woman, life estate abolished, 194, 227
Woman's estate
incidents of, 225
absolute possession, 225
alienation for legal necessity, 225
beneficial enjoyment, 225
can sue or be sued, 225
devolution, 226
dispossession, 226
life interest, 226
management, 226
restrictions, 226
Woman's estate (*contd.*)
self effacement and acceleration, 226
subsequent unchastity, 226
when divested, 226
nature of, 224
position after the HSA 1956, 227
absolute interest created, 227
change is constitutional, 228
limited ownership abolished, 227
meaning of property, 227
subsequent remarriage, 228
position before the HSA 1956, 224
two categories, 224
absolute right of disposition (Stridhana), 224
limited power of disposition (Woman's estate), 224